

86-629

No. \_\_\_\_-\_\_\_\_

Supreme Court, U.S.  
FILED

OCT 6 1986

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1986

SEATTLE MASTER BUILDERS ASSOCIATION, et al.,  
*Petitioners,*

v.

PACIFIC NORTHWEST ELECTRIC POWER  
AND CONSERVATION PLANNING COUNCIL,  
*Respondent,*

UNITED STATES OF AMERICA.  
*Intervenor-Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

JOHN W. HEMPELMANN  
*Counsel of Record, and*

PAUL SIKORA  
MICHAEL B. KING  
DIAMOND & SYLVESTER  
2600 Columbia Center  
701 Fifth Avenue  
Seattle, Washington 98104-7088  
(206) 623-1330  
*Attorneys for Petitioner*

125 pp





## I. QUESTIONS PRESENTED

This case arises under the Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2697, 16 U.S.C. §§ 839-839h (1980) ("Act"). The Act deals with electric power development. This case concerns the authority and actions of the Pacific Northwest Electric Power and Conservation Planning Council ("Council"), a state governor appointed body established under the Act. The Act calls for the Council to share with the federal Bonneville Power Administration ("BPA") responsibility for developing and implementing an electric energy development and conservation plan. Jurisdiction to review the Council's authority and actions is vested exclusively in the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"). 16 U.S.C. § 839f(e)(5). As other Courts of Appeal are precluded from direct consideration of the Council's authority and actions, this petition is the first and likely only opportunity for this Court to review the following three questions:

1. Whether state governor appointment of an agency may be upheld under the Appointments Clause and national supremacy principles of the United States Constitution, when that agency's only authority is over a federal agency's execution of federal law, with state and local agencies free to ignore the dictates of the state governor appointed agency.
2. Whether an agency may be exempted from National Environmental Policy Act and state environmental impact statement requirements for its adoption of energy conservation requirements and other measures that admittedly affect the environment, when: (1) the federal law that establishes the agency's powers and duties expressly requires construction of those powers and duties "in a manner consistent with applicable environmental laws;" and (2) the United States Circuit Court holding that the agency's action does not substantially impact the environment conflicts with the test for substantial impact adopted by other Circuit Courts.

3. Whether an agency may be permitted through a "reasonable" statutory interpretation to require energy conservation measures that satisfy only one cost criterion, when the federal statute's language requires they satisfy two criteria, and the independent purpose of each criterion is apparent from the legislative history.

## II. LIST OF PARTIES

Petitioners are Seattle Master Builders Association, Homebuilders Association of Spokane, Inc., National Woodwork Manufacturers' Association, Fir & Hemlock Door Association, Shelter Development Corporation, Clair W. Daines, Inc., Conner Development Company, Donald N. McDonald, Seattle Door Company, Inc., and Homebuilders Association of Washington State.

The Respondent is the Pacific Northwest Electric Power and Conservation Planning Council.

The Intervenor-Respondent is the United States of America.

## TABLE OF CONTENTS

	<u>Page</u>
Questions Presented .....	i
List of Parties .....	ii
Opinion Below .....	1
Jurisdiction .....	1
Constitutional, Statutory, and Regulatory Provisions Involved .....	2
Introduction .....	3
Statement of The Case .....	4
1. Congress and the Act. ....	5
A. Council Appointment and Authority. ....	5
B. Environmental Accountability. ....	7
C. Allocating Energy Conservation Benefits and Costs. ....	7
2. The Council, the Act, and the Plan. ....	8
A. Council Appointment and Authority. ....	8
B. Environmental Accountability. ....	8
C. Allocating Energy Conservation Benefits and Costs. ....	8
3. Ninth Circuit Proceedings. ....	9
A. Council Appointment and Authority. ....	10
B. Environmental Accountability. ....	10
C. Allocating Energy Conservation Benefits and Costs. ....	10

## TABLE OF CONTENTS, cont.

	<u>Page</u>
Reasons For Granting The Writ .....	11
1. The Ninth Circuit Has Authorized a State Governor Appointed Body to Control Solely a Federal Agency's Execution of Federal Law, in Contravention of the Appointments Clause and Supremacy Principles of the United States Constitution.....	11
2. The Ninth Circuit's Holding Exempting the Council From National Environmental Policy Act and State Environmental Impact Statement Requirements Ignores the Act's Mandate for Environmental Review, Conflicts with Other Circuit Court Tests for Substantial Impact, and Erodes Important Environmental Protections. ....	21
a. Congress Intended Council Compliance with Environmental Review Requirements, Irrespective of the Council's Status as a State or Federal Agency.....	21
b. The Ninth Circuit's Holding that the Council's Plan Does Not Have a Substantial Environmental Impact Conflicts with Other Circuit Court Tests for Substantial Impact. ....	23
c. The Ninth Circuit's Holding Erodes Important Environmental Protections.....	24
3. The Ninth Circuit has Permitted the Council to Eliminate, by "Reasonable Agency Interpretation," a Federal Statutory Requirement That Protects Housing Consumers Against Hundreds of Millions of Dollars in Excess Construction Costs. .	24
CONCLUSION .....	30

## TABLE OF CONTENTS, cont.

Page

## APPENDICES:

Appendix A Opinion and Judgement of the Ninth Circuit . . . . .	A-1
-----------------------------------------------------------------	-----

*(The following Appendices bound in separate volumes.)*

Appendix B Amendment to the Opinion and Judgement of the Ninth Circuit . . . . .	B-1
----------------------------------------------------------------------------------	-----

Appendix C United States Constitution, Art. I, § 10, cl. iii ("Compacts Clause") . . . . .	C-1
--------------------------------------------------------------------------------------------	-----

Appendix D United States Constitution, Art. I, § 2, cl. ii ("Appointments Clause") . . . . .	D-1
----------------------------------------------------------------------------------------------	-----

Appendix E Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h . . . . .	E-1
------------------------------------------------------------------------------------------------------------	-----

Appendix F National Environmental Policy Act, 42 U.S.C. §§ 4331-4332 . . . . .	F-1
--------------------------------------------------------------------------------	-----

Appendix G Washington Environmental Policy Act, Wash. Rev. Code §§ 43.21C.020 to .031 . . . . .	G-1
-------------------------------------------------------------------------------------------------	-----

Appendix H Montana Environmental Protection Act, Mont. Code Ann. §§ 75-1-102 to 201 . . . . .	H-1
-----------------------------------------------------------------------------------------------	-----

Appendix I Idaho Enabling Legislation, Idaho Code §§ 61-1201, -1203 . . . . .	I-1
-------------------------------------------------------------------------------	-----

Appendix J Montana Enabling Legislation, Mont. Code Ann. §§ 90-4-401, -402 . . . . .	J-1
--------------------------------------------------------------------------------------	-----

Appendix K Oregon Enabling Legislation, Or. Rev. Stat. § 469.800 . . . . .	K-1
----------------------------------------------------------------------------	-----

Appendix L Washington Enabling Legislation, Wash. Rev. Code §§ 43.52A.018, -.040 . . . . .	L-1
--------------------------------------------------------------------------------------------	-----

## TABLE OF CONTENTS, cont.

	<u>Page</u>
Appendix M 1983 Pacific Northwest Conservation Electric Power Plan Volume I . . . . .	M-1
Appendix N . . . . . Volume II . . . . .	N-1
Appendix O . . . . . Volume IV . . . . .	O-1
Appendix P Seattle Master Builders Association, et al. v. Northwest Power Planning Council, Brief for United States as Inter- venor . . . . .	P-1
Appendix Q Seattle Master Builders Association, et al. v. Northwest Power Planning Council, Reply Brief of Respondent Northwest Power Planning Council to Brief for United States as Intervenor . . . . .	Q-1
Appendix R Seattle Master Builders Association, et al. v. Northwest Power Planning Council, Petitioners' Reply Brief . . . . .	R-1
Appendix S Seattle Master Builders Association, et al. v. Northwest Power Planning Council, Petition for Rehearing with Suggestion for Rehearing En Banc by Intervenor United States . . . . .	S-1
Appendix T Seattle Master Builders Association, et al. v. Northwest Power Planning Council, Petition for Rehearing and Suggestion for Rehearing En Banc by Petitioners . . . . .	T-1
Appendix U Minutes, Conservation Subcommittee, May 21, 1982 (Doc. 233/01396) . . . . .	U-1
Appendix V Doc. 440/01494, New and Existing Structures Model Standards and Con- servation Program, Decision Memo- randum . . . . .	V-1
Appendix W Council Meeting 36, Minutes . . . . .	W-1
Appendix X Council Meeting 7, Transcript . . . . .	X-1

## TABLE OF AUTHORITIES

Cases	<u>Page</u>
<i>ALCOA v. Central Lincoln Peoples' Util. Dist.</i> , 104 S. Ct. 2472 (1984) . . . . .	5
<i>Ashwander v. TVA</i> , 297 U.S. 288 (1936) . . . . .	11
<i>Bowsher v. Synar</i> , 106 S. Ct 3181 (1986) . . . . .	13,14,19,20
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) . . . . .	13,14,16
<i>California v United States</i> , 438 U.S. 645 (1978) . . . . .	19
<i>Chevron USA, Inc v. NRDC</i> , 104 S. Ct. 2778 (1984) . . . . .	28,29
<i>Clallam County v. United States</i> , 263 U.S. 341 (1923) . . . . .	17
<i>Colorado Dept of Employment v. United States</i> , 385 U.S. 355 (1966) . . . . .	17,18
<i>Duke Power Co. v. Carolina Envtl. Study Group, Inc.</i> , 438 U.S. 59 (1978) . . . . .	12
<i>Farmers &amp; Mechanics Nat'l Bank v. Dearing</i> , 91 U.S. 29 (1875) . . . . .	17,18
<i>Federal Land Bank v. Kiowa County Board of Comm'rs</i> , 368 U.S. 146 (1961) . . . . .	19
<i>Flint Ridge Dev. Co. v. Scenic Rivers Asso'n.</i> , 426 U.S. 761 (1976) . . . . .	22,23
<i>Free v. Bland</i> , 369 U.S. 663 (1962) . . . . .	20
<i>Garcia v. San Antonio Metropolitan Transp. Auth.</i> , 105 S. Ct. 1005 (1985) . . . . .	19
<i>Graves v. New York ex rel. O'Keefe</i> , 306 U.S. 466 (1939) . . . . .	19
<i>Hancock v. Train</i> , 426 U.S. 167 (1976) . . . . .	19



## TABLE OF AUTHORITIES, cont.

Cases	<u>Page</u>
<i>INS v. Chadha</i> , 462 U.S. 919 (1983) . . . . .	20
<i>Johnson v. Maryland</i> , 254 U.S. 51 (1920) . . . . .	18
<i>Kern-Limerick, Inc. v. Scurlock</i> , 347 U.S. 110 (1954) . . .	19
<i>Mayo v. United States</i> , 319 U.S. 441 (1943) . . . . .	17,18
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819) . . . . .	17,18,19
<i>Memphis Bank &amp; Trust Co. v. Garner</i> , 459 U.S. 392 (1983) . . . . .	17,18
<i>Nash v. Florida Indus. Comm'n</i> , 389 U.S. 235 (1967) . . .	18
<i>National Helium Corp v. Morton</i> , 455 F.2d 650 (10th Cir. 1971) . . . . .	23
<i>New York ex rel. Bank of Commerce v. New York City and County Commissioners for Taxes and Assess- ments</i> , 67 U.S. (2 Black) 620 (1863) . . . . .	17
<i>North Dakota ex rel. Flaherty v. Hanson</i> , 215 U.S. 515 (1910) . . . . .	18
<i>Northeast Bancorp, Inc. v. Federal Reserve Bd.</i> 105 S. Ct. 2545 (1985) . . . . .	12
<i>Pacific Gas &amp; Elec. Co. v. California Energy Resources Conservation &amp; Dev. Comm'n</i> , 461 U.S. 190 (1983) . . .	11,12
<i>Petty v. Tennessee-Missouri Bridge Comm'n</i> , 359 U.S. 275 (1959) . . . . .	21,22
<i>Phillips Chem. Co. v. Dumas Indep. School Dist.</i> , 361 U.S. 376 (1960) . . . . .	18



## TABLE OF AUTHORITIES, cont.

Cases	<u>Page</u>
<i>Prudential Ins. Co. v. Benjamin</i> , 328 U.S. 408 (1946) . . .	17,19
<i>Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power Planning &amp; Conservation Council</i> , 786 F.2d 1359 (9th Cir. 1986) . . . . .	1,9,10,11,12,16,17, 20,21,22,23,27,28
<i>Sierra Club v. Lynn</i> , 502 F.2d 43 (5th Cir. 1974), <i>cert. denied</i> , 421 U.S. 994 (1975) . . . . .	23
<i>Stephens v. Cherokee Nation</i> , 124 U.S. 445 (1899) . . . .	28
<i>Synar v. United States</i> , 626 F. Supp. 1374 (D.D.C.), <i>aff'd, sub nom. Bowsher v. Synar</i> , 106 S. Ct. 3181 (1986) . . . . .	13
<i>Tennessee v. Davis</i> , 100 U.S. 245 (1880) . . . . .	17
<i>Testa v. Katt</i> , 330 U.S. 386 (1947) . . . . .	18
<i>Thomson v. Union P. R.R.</i> , 76 U.S. 579 (1870) . . . . .	18
<i>United States v. Clark</i> , 454 U.S. 555 (1982) . . . . .	28
<i>United States v. Fresno County</i> , 429 U.S. 452 (1977) . .	18,19
<i>United States v. Mississippi State Tax Comm'n</i> , 421 U.S. 599 (1975) . . . . .	17
<i>United States v. New Mexico</i> , 455 U.S. 720 (1982) . . . .	18
<i>United States v. Riverside Bayview Homes, Inc.</i> , 106 S. Ct. 455 (1985) . . . . .	27,29
<i>Van Brocklin v. Anderson</i> , 117 U.S. 151 (1886) . . . .	17,18
<i>WATCH v. Harris</i> , 603 F.2d 310 (2d Cir 1979) . . . . .	23
<i>Washington v. United States</i> , 460 U.S. 536, 544 (1983) . . . . .	13,19
<i>Weston v. Charleston</i> , 27 U.S. (2 Pet.) 449 (1829) . . . .	18

## TABLE OF AUTHORITIES, cont.

Constitution, Statutes, and Regulations	<u>Page</u>
United States Constitution, Art. I, § 10, cl. iii . . . . .	2,13
United States Constitution, Art. II, § 2, cl. ii . . . . .	2,3,6,10, 11,12,13,19,30
16 U.S.C. §§ 832-832l . . . . .	4
16 U.S.C. § 832a(a) . . . . .	1,9
16 U.S.C. §§ 839-839h . . . . .	2
16 U.S.C. § 839 . . . . .	7,21,22
16 U.S.C. § 839(3)(C) . . . . .	7,21
16 U.S.C. § 839a(4)(A) . . . . .	25
16 U.S.C. § 839a(12) . . . . .	6
16 U S C. § 839a(19) . . . . .	6
16 U.S.C. § 839b(a)(2) . . . . .	8
16 U.S.C. § 839b(d)(1) . . . . .	5
16 U.S.C. § 839b(d)(2) . . . . .	5
16 U.S.C. § 839b(f)(1) . . . . .	7,8,24,28
16 U.S.C. § 839b(j) . . . . .	6
16 U.S.C. § 839d(a) . . . . .	26
16 U.S.C. § 839d(a)(1) . . . . .	6,11
16 U.S.C. § 839d(b)(2) . . . . .	6
16 U.S.C. § 839d(b)(5) . . . . .	6
16 U.S.C. § 839d(c)(3)(B) . . . . .	6
16 U.S.C. § 839f(e)(5) . . . . .	9
16 U.S.C. § 839g(a) . . . . .	6,11

## TABLE OF AUTHORITIES, cont.

Constitution, Statutes, and Regulations	<u>Page</u>
28 U.S.C. § 1254(1) .....	2
33 U.S.C. §§ 1501-1524 .....	20
33 U.S.C. § 1508 .....	20
42 U.S.C. §§ 4331-4332 .....	2
42 U.S.C. §§ 4332 .....	22,24
42 Stat. 174 .....	20
75 Stat. 688 .....	20
Idaho Code §§ 61-1201, -1203 .....	2
Idaho Code § 1201 .....	22
Mont. Code Ann. §§ 90-4-401, -402 .....	2
Mont. Code Ann. § 90-4-402 .....	22
Mont. Code Ann. §§ 75-1-102 to 75-2-201 .....	2
Mont. Rev. Code Ann. § 75-1-103 .....	24
Mont. Rev. Code Ann. § 75-1-201 .....	22
Mont Rev Code Ann. § 75 1-201(1)(b) .....	22
Or. Rev. Stat. § 469.800 .....	2,22
Wash. Rev. Code §§ 43.21C.020 to .031 .....	2
Wash. Rev. Code § 43.21C.020 .....	24
Wash. Rev. Code § 43.21C.030(2) .....	22
Wash. Rev. Code § 43.52A.030 .....	22
Wash. Rev. Code §§ 43.52A.018 -.040 .....	2

## TABLE OF AUTHORITIES, cont.

Constitution, Statutes, and Regulations	<u>Page</u>
Pacific Northwest Regional Electric Power and Conservation Plan Vol. I .....	2,8,9, 23,27,29
Pacific Northwest Regional Electric Power and Conservation Plan Vol. II .....	2,29
Pacific Northwest Regional Electric Power and Conservation Plan Vol. IV .....	2,27
 <b>Legislative Materials</b>	
H.R. 3074, 99th Cong., 1st Sess. (July 24, 1985) .....	20
H.R. Rep. No. 976 (Pt. I), 96th Cong. 2d Sess. (1980) .....	5,6,28
H.R. Rep. No. 976 (Pt. II), 96th Cong., 2d Sess. (1980) ..	5, 6,8,25,26,27
S. Rep. No. 272, 96th Cong., 1st Sess. (1979) .....	5,6,7,28
126 Cong. Rec. S14692 (daily ed. Nov. 19, 1980) (remarks of Sen. Jackson) .....	28
126 Cong. Rec. H9853 (daily ed. Sept. 29, 1980) (remarks of Rep. Swift) .....	8,25,26,27
126 Cong. Rec. H9862-64 (daily ed. Sept. 29, 1980) (remarks of Rep. Foley) .....	5,6
125 Cong. Rec. H2059 (daily ed. Apr. 5, 1979) (remarks of Rep. Ullman) .....	7
125 Cong. Rec. S11592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield) .....	3

## TABLE OF AUTHORITIES, cont.

Other Authorities	<u>Page</u>
M. Blumm, <i>The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act</i> , 58 Wash. L. Rev. 175 (1983) .....	5
M. Boher, J. Noming, & R. Morrison, ENVIRONMENTAL IMPACT STATEMENTS: A GUIDE TO PREPARATION AND REVIEW (1977 ed.) .....	24
M. Farrand, RECORDS OF THE FEDERAL CONVENTION (1911 ed.) .....	14, 15, 16
THE FEDERALIST (J. Cooke ed. 1961) by Alexander Hamilton	
NO. 15 .....	13
NO. 16 .....	13
NO. 70 .....	14, 15, 16
NO. 77 .....	14
by James Madison	
NO. 47 .....	16
NO. 48 .....	14
NO. 49 .....	14
NO. 51 .....	14, 15
L. Tribe, <i>Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues and Controversies About Federalism</i> , 89 Harv. L. Rev. 682 (1976) .....	12
C. Warren, THE MAKING OF THE CONSTITUTION (1937 ed.) .....	13



**IN THE  
Supreme Court of the United States**

---

**October Term, 1986**

---

**SEATTLE MASTER BUILDERS ASSOCIATION, et al.,  
*Petitioners,***

**v.**

**PACIFIC NORTHWEST ELECTRIC POWER  
AND CONSERVATION PLANNING COUNCIL,  
*Respondent,***

**UNITED STATES OF AMERICA,  
*Intervenor-Respondent.***

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

The Petitioners Seattle Master Builders Association, et al., respectfully pray that a writ of certiorari ~~issue~~ to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

**OPINION BELOW**

The Ninth Circuit's divided opinion as amended, reported at 786 F.2d 1359, appears in Appendix A to this petition.

**JURISDICTION**

The Ninth Circuit's split decision was rendered on April 10, 1986, and thereafter amended by order dated June 11, 1986. Timely petitions for rehearing and suggestions for

rehearing *en banc* filed by the Petitioners and Intervenor-Respondent United States were denied on July 8, 1986, and this petition for certiorari was filed thereafter within 90 days. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following constitutional provisions, statutes and regulations are at issue in this case. The relevant portions of each are included in Appendices C through O.

United States Constitution, Art. I, § 10, cl. iii ("Compacts Clause") (Appendix C).

United States Constitution, Art. I, § 2, cl. ii ("Appointments Clause") (Appendix D).

16 U.S.C. §§ 839-839h (Pacific Northwest Electric Power Planning and Conservation Act) ("Act") (Appendix E).

42 U.S.C. §§ 4331 - 4332 (National Environmental Policy Act or "NEPA") (Appendix F).

1983 Pacific Northwest Conservation and Electric Power Plan, Vol. I, II & IV ("Plan") (Appendices M through O).

Wash. Rev. Code §§ 43.21C.020 to .031 (Washington Environmental Policy Act) (Appendix G).

Mont. Code Ann §§ 75-1-102 to 2-201 (Montana Environmental Protection Act) (Appendix H).

Idaho Code §§ 61-1201, -1203 (enabling Idaho to participate on the Pacific Northwest Electric Power and Conservation Planning Council) ("the Council") (Appendix I).

Mont. Code Ann §§ 90-4-401, -402 (enabling Montana to participate on the Council) (Appendix J).

Or. Rev. Stat. § 469.800 (enabling Oregon to participate on the Council) (Appendix K).

Wash. Rev. Code §§ 43.52A.018-.040 (enabling Washington to participate on the Council) (Appendix L).



## INTRODUCTION

This case arises under an act described by its congressional sponsors as "without doubt . . . the most important bill ever to have affected the Pacific Northwest." 125 *Cong. Rec.* S11592 (daily ed. Aug. 3, 1979) (remarks of Sen. Hatfield). The case concerns issues of vital importance to the region and the nation.

To begin, the Ninth Circuit has held that the Appointments Clause places no limits on Congress' right to delegate the President's appointment power to state governors. The Ninth Circuit has upheld the right of the Council, a state governor appointed body, to control execution of the Act, a federal law, by the Bonneville Power Administration ("BPA") Administrator, a federal officer. Yet, the Council has no authority to control the related actions of state and local agencies. Our Constitution's Framers expressly denied Congress the power the Ninth Circuit has upheld, because they feared the consequences for effective national government of permitting such state control of the execution of national law. Especially given recent and proliferating state demands for greater control over the execution of national law, the Ninth Circuit's holding threatens to unravel the Framers' intended separation of powers between the state and national governments. Equally important, the holding threatens to weaken dangerously the Executive branch vis-a-vis the Legislative branch within the national government.

In addition, the Ninth Circuit has departed in two important respects from Congress' carefully wrought solution to Pacific Northwest energy woes, and in a fashion with national implications. First, the Ninth Circuit has exempted the Council from any environmental impact statement ("EIS") requirement for its fundamental planning function. This holding: (1) is inconsistent with Congress' expressed intent for application of environmental law requirements; (2) is irreconcilable with the rule that EIS exemptions may be found only from the clearest evidence of congressional intent; and (3) rests on a test for substantial environmental impact that

conflicts with the tests employed by other Circuit courts, and could produce a gutting of EIS protections. Second, the Ninth Circuit has swept away the Act's express protection for consumers against excessive conservation costs. This holding rests on: (1) an unwarranted application of the administrative law principle of deference to agency statutory interpretation; and (2) a clearly erroneous reading of legislative intent. The result is a rule of deference that permits an administrative agency to rewrite statutes at will, and at a cost of hundreds of millions of dollars to Pacific Northwest housing consumers.

### STATEMENT OF THE CASE

This statement describes the origin of the Act, and how Congress, the Council, and the Ninth Circuit, in turn, dealt with the three matters underlying the issues in this case: (1) the Council's appointment and authority; (2) accountability for environmental impacts of action taken under the Act; and (3) allocating the economic benefits and costs of energy conservation, as required under the Act.

Under the Bonneville Project Act of 1937, 16 U.S.C. §§ 832-832l, and subsequent legislation, BPA for over 40 years marketed hydroelectric power generated from federally owned dams on the Columbia River. Purchasers included publicly and privately owned utilities, industries such as aluminum manufacturers, federal agencies in the Pacific Northwest, and customers outside the region. Through the early 1970's this hydroelectric power system, augmented by power generating facilities owned and operated by some local utilities, provided sufficient power for all customers.

Eventually, increasing demand threatened to exceed the system's maximum generating potential. By the late 1970's, it was generally believed that the Pacific Northwest faced serious electric power shortages. As BPA lacked the authority to acquire additional power generating facilities, it began to prepare a program for administrative allocation of federal power supplies. These supplies were much cheaper than alternatives, and competition among potential claimants for

the largest possible share threatened to disrupt the system through prolonged litigation.<sup>1</sup> The Act was the solution. *ALCOA v. Central Lincoln Peoples' Util. Dist.*, 104 S. Ct. 2472, 2478 (1984).

## 1. Congress and the Act.

### A. Council Appointment and Authority.

It was generally agreed that the remedy for the region's energy woes would have to include empowering BPA to acquire resources to increase the supply of federal power. See M. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 Wash. L. Rev. 175, 229-30 (1983) ("Blumm"); cf. *ALCOA*, 104 S. Ct. at 2478. However, this approach raised concerns that BPA would become the region's energy "czar," with a role akin to the TVA's in the Southeast. E.g., Foley Statement, *supra*, n.1, at H9863. The Pacific Northwest over 30 years before rejected such a "Columbia Valley Authority." Blumm, 58 Wash. L. Rev. at 207-08. A looming power crisis had not changed most minds. See Foley Statement at H9863-64.

The Council was the solution. The Council would prepare a regional electrical power plan ("Plan"). 16 U.S.C. § 839b(d)(1). In general, BPA actions to acquire energy resources would have to be consistent with the Plan. 16 U.S.C. § 839b(d)(2). In particular, BPA would have to implement energy conser-

---

<sup>1</sup> See, e.g., House Committee on Interstate and Foreign Commerce, *Report No. 976* (Pt. I), 96th Cong., 2d Sess. 23-27 (1980), *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 598-93 ("House Commerce Report"); House Committee on Interior and Insular Affairs, *Report No. 976* (Pt. II), 96th Cong., 2d Sess. 26-32 (1980), *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 6023-30 ("House Interior Report"); Senate Committee on Energy and Natural Resources, *Report No. 272*, 96th Cong., 1st Sess. 17-18 (1979) (Bonneville Power Administration Library, 1981) ("Senate Report"); 126 *Cong. Rec.* H9862-64 (daily ed. Sept. 29, 1980) (remarks of Rep. Foley) ("Foley Statement").

vation measures required by the Plan. 16 U.S.C. § 839d(a)(1).<sup>2</sup> In the event of a dispute between the Council and BPA, the Council would be able to force BPA to make a final decision, subject to court challenge (e.g., by the Council) for failure to comply with the Plan. See 16 U.S.C. § 839b(j). The Council's authority, however, would be only over BPA; state and local governments were expressly exempted from complying with the Plan. See 16 U.S.C. 839g(a)<sup>3</sup>

<sup>2</sup> BPA's discretion is particularly limited in this regard. Under the Act, conservation is treated like a 1,000 megawatt thermal generating plant; just another resource. 16 U.S.C. § 839a(19). The Act, in turn, distinguishes between major and minor resources: a resource that represents 50 megawatts per year over at least five years is a major resource. 16 U.S.C. § 839a(12). While BPA major resource acquisitions are subject to Council veto (the only relief is an act of Congress), BPA may acquire minor resources that are inconsistent with the Council's Plan, so long as they are consistent with the Act. Compare 16 U.S.C. § 839d(c)(3)(B) to 16 U.S.C. § 839d(b)(2) (BPA discretion regarding minor resources). This would appear to relieve BPA from complying with the Plan's conservation requirements. Residential conservation is made up of thousands of individual measures (e.g., triple-pane glazing on a window), and none of those alone is a major resource. However, the Act expressly provides that BPA's discretion regarding minor resources *does not extend to energy conservation: the BPA must comply with the Plan's conservation requirements.* See 16 U.S.C. § 839d(b)(5).

<sup>3</sup> Congress never wavered from its commitment to a council with the power to control BPA actions. See House Interior Report at 33, 35-36; House Commerce Report at 28, 33; Senate Report at 14, 15; Foley Statement at H9863-64. However, Congress did waver from state governor appointment of Council members. The first version of the Council proposed state governor appointment. *Id.* at H9863. After the United States Department of Justice objected on Appointments Clause grounds, appointment by the Secretary of Energy was substituted. *Id.* However, this was unsatisfactory to many, because only state governor appointment could provide the desired check over BPA. See *id.* After Congress concluded that the Appointments Clause was supposedly irrelevant to the separation of powers between the state and national governments, it restored state governor appointment. See *id.* at H9863-64; see also House Interior Report at 70 (supplemental views of Rep. Williams, sponsor of amendments restoring state governor appointment).

### ***B. Environmental Accountability.***

Congress recognized that a major aspect of the energy problem confronting the Pacific Northwest was obtaining future power supplies "in an economical *and environmentally responsible manner*." 125 *Cong. Rec.* H2059 (daily ed. Apr. 5, 1979) (remarks of Rep. Ullman) (emphasis added). It therefore declared an independent purpose of the Act would be to "provide... environmental quality" through the cooperation of government, electricity consumers, and the general public. 16 U.S.C. 839(3)(C). It required the Act be construed "in a manner consistent with applicable environmental laws." 16 U.S.C. § 839. It provided no exemption for the Council from EIS requirements.

### ***C. Allocating Energy Conservation Benefits and Costs.***

Congress was concerned about the cost of future power supplies. *E.g.*, 125 *Cong. Rec.* H2059 (daily ed. Apr. 5, 1979) (remarks of Rep. Ullman). Congress at first required that conservation be "cost effective for consumers." Senate Report, *supra*, n.1, at 21. However, this requirement proved inadequate. "Cost effective," was defined in terms of "cost comparisons among and between alternative measures and resources," while "cost effective for consumers" in the conservation area was a function of the comparison between the cost of conservation and the savings produced by compliance. *See id.* at 21, 25. These definitions demonstrate that Congress had two cost concerns; assuring maximum savings for the region, without imposing an economic burden on individual consumers. A conservation measure might be cost-effective for the region, yet cost consumers more than the electricity saved. The single requirement of "cost effective for consumers" did not address both concerns.

Congress therefore changed the Act to require that conservation be *both* "cost-effective for the region and economically feasible for consumers." 16 U.S.C. § 839b(f)(1). Congress further required, as a precondition to implementing



conservation measures, that consumers be reimbursed when the cost of any measure exceeded the value of electricity saved. *Id.* See House Interior Report, *supra*, n.1 at 73; 126 *Cong. Rec.* H9853 (daily ed. Sept. 29, 1980) (remarks of Rep. Swift).

## **2. The Council, The Act, And The Plan.**

### ***A. Council Appointment and Authority.***

The Council was constituted in 1983 through its appointment by the governors of four member states. See 16 U.S.C. § 839b(a)(2). The Council's interpretation of its authority over BPA was and is that BPA must conform to the Plan's resource acquisition requirements, including the Plan's residential energy conservation standards. Council Reply Br. at 5-12 (all brief and petition excerpts reproduced in Appendices P through T).

### ***B. Environmental Accountability.***

The Council admitted that the Plan's residential conservation requirements could increase environmental hazards, such as greater concentrations of pollutants in homes due to reduced ventilation. See Plan Vol. I at 9-2. More generally, the Plan requires BPA to acquire between 1,000 and 11,000 megawatts of additional energy resources over 17 years (including such resources as new coal-fired generating plants). *Id.*, figs 5-1 to 5-4. Notwithstanding these impacts, the Council declined to prepare either a state or federal environmental impact statement.

### ***C. Allocating Energy Conservation Benefits and Costs.***

Before the Plan's adoption, the Council repeatedly stated that the Act required reimbursement to consumers when the cost of any conservation measure exceeded the value of electricity saved, even though the measure might be cost-effective for the region. Mtg. 7, T. at 1a-14 to 15, 1b-4 to 1b-9; Conservation Subcommittee, minutes, May 21, 1982 at 4 (Doc.

233/01396); Mtg. 36, M. at 1, 4; Doc. 440/04494 at 2-3 (reproduced in Appendices U through X). The adopted Plan ignores this requirement. Although the Plan requires conservation measures whose costs exceed electricity savings, *see infra*, at 30, n.21, the Plan provides no reimbursement. Plan Vol. I, 7-1, 10-4 to 10-11.

### 3. Ninth Circuit Proceedings.

On July 29, 1983, the Petitioners began this action in the Ninth Circuit against the Council. *See* 16 U.S.C. § 839f(e)(5) (Ninth Circuit jurisdiction). Upon notice of the challenge to the constitutionality of the Council's appointment, the United States intervened.<sup>4</sup>

---

<sup>4</sup> The Ninth Circuit opinion states that the Petitioners sought relief against both the Council and "the United States government," 786 F.2d at 1362, and Judge Beezer's dissent states that the United States "intervened on behalf of the Council." *Id.* at 1371. Neither statement is correct.

First, contrary to the majority suggestion, the Petitioners' case involves no claim for relief from BPA authority or actions. Second, contrary to Judge Beezer's suggestion, the United States did *not* intervene unqualifiedly on the Council's behalf. The United States, in opposition to the Petitioners *and* the Council, intervened to urge the Ninth Circuit not to decide the issue of the constitutionality of the Council's appointment. In particular, the United States argued, in opposition to the Council and the Petitioners, that the constitutional issue was not ripe, and that the Petitioners lacked standing to raise it. *Compare* United States Br. at 23-29 to Council's Reply Br. at 5-13, Petitioners' Reply Br. at 36-39. The United States reiterated these positions in its petition for rehearing and suggestion for rehearing *en banc*. United States Pet. at 6-13. *See also, infra*, n.6 (discussing merit of United States' ripeness and standing objections).

However, the United States also gave what was at least a strong hint of its views on the merits. Those views — taken in opposition to the Council, *not* the Petitioners — were that the United States had grave doubts about the constitutionality of the Council's appointment, given a Council action binding on BPA. United States Br. at 12-23. Moreover, the United States reiterated those doubts even more strongly when urging rehearing. United States Pet. at 6-7, 9, 11, n.6, 13.

### ***A. Council Appointment and Authority.***

The Ninth Circuit affirmed the constitutionality of the Council's appointment. It rejected an Appointments Clause challenge, holding that: (1) the Clause concerns only the separation of powers between branches of the national government; and (2) the Clause bars only attempts by Congress to exercise itself the power to appoint executive officers. 786 F.2d at 1365.

### ***B. Environmental Accountability.***

The Ninth Circuit affirmed the Council's decision not to prepare an EIS. It held that: (1) as the Council is a creature of an interstate compact, it is not required to conform to state EIS requirements; and (2) the Council also is not required to prepare an EIS under the federal National Environmental Policy Act, because the Council had taken no "substantial federal action" affecting the environment. 786 F.2d at 1371.

### ***C. Allocating Energy Conservation Benefits and Costs.***

The Ninth Circuit affirmed the Council's refusal to reimburse consumers when conservation measure costs exceeded electrical savings. It held that: (1) the Council's interpretation of the Act was entitled to substantial deference; and (2) the Council's refusal was a reasonable interpretation of what the court characterized as the Act's goal of "economic efficiency." 786 F.2d at 1367-1369.



## REASONS FOR GRANTING THE WRIT

There are three reasons why the Court should issue a writ of certiorari to review the judgment and opinion of the Ninth Circuit in this case.

1. **The Ninth Circuit Has Authorized a State-Governor Appointed Body to Control Solely a Federal Agency's Execution of Federal Law, in Contravention of the Appointments Clause and Supremacy Principles of the United States Constitution.**

Under the Act, the Council's residential conservation requirements (Model Conservation Standards, or "MCS") only bind BPA; state and local government is expressly exempted from compliance. *Compare, e.g.,* 16 U.S.C. § 839d(a)(1) to 839g(a). *See also supra* at 6, n.2, 7, n.3. Moreover, the Ninth Circuit agreed that BPA conservation-related actions must be consistent with the Plan. 786 F.2d at 1362.<sup>4\*</sup> Yet the

<sup>4</sup> The Ninth Circuit stated that it did not "reach" the question whether the Council "exercise[s] significant authority over federal government actions." 786 F.2d at 1365. If this statement means that the Ninth Circuit ruling assumes, *but does not decide*, that the Council's residential conservation requirements are binding on BPA, then it should be reviewed by this Court for another reason, relating to fundamental questions of federal court jurisdiction. If the requirements are *not* binding on BPA, then the "clean bill of constitutional health" the Ninth Circuit gave the Council violates basic bars against gratuitous rulings on constitutional issues, *see, e.g., Ashwander v. TVA*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring), and constitutes an advisory opinion, beyond the power of a federal court to offer.

<sup>5</sup> As previously indicated, *supra*, n.4, the United States argued that no decision on the constitutionality of the Council's appointment should have been made in this case, purportedly because the issue was not ripe, and the Petitioners had no standing to raise it. These claims are without merit. As previously demonstrated, *supra* at 6, n.2, 7, n.3, the plain language of, and congressional intent underlying the Act require BPA to conform to the Plan's conservation requirements: the constitutionality of the Council's appointment is ripe for review. *E.g., Pacific Gas & Elec. Co. v. California Energy Resources Conservation & Dev. Comm'n*, 461

(footnote continued on next page)

Ninth Circuit upheld the constitutionality of state governor appointment of Council members. The Ninth Circuit concluded that, because the Council's members purportedly do not serve "pursuant to federal law," there is no violation of what the Ninth Circuit conceded is the Appointments Clause's requirement that the federal Executive appoint those who "exercise significant authority over federal government actions . . . ." *Id.* at 1365. Finding the Council the creature of an interstate compact, the Ninth Circuit dismissed Appointments Clause objections with the sweeping holding that the Clause is only "about maintaining the separation of powers *within the federal government* . . . ." *Id.* at 1363 (emphasis added), 1365.

The Ninth Circuit's holding is the impermissible result of viewing the Council's appointment and authority "through the lens of federalism without the filter of the separation of powers." L. Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues and Controversies About Federalism*, 89 Harv. L. Rev. 682, 683 (1976). Even assuming the Council's appointment and authority are not the product of federal law,<sup>7</sup> the Ninth Circuit gives Congress unfettered discretion to subordinate the federal Executive's administration of national law to state

---

U.S. 190, 200-01 (1983). Moreover, as is demonstrated, *infra* at 29, nn.19-21,30, nn.22-23, the Petitioners are suffering actual injury from the Council's promulgation of the Plan's residential conservation requirements; the Petitioners have standing. *E.g.*, *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72, 74, 77-78 (1978).

<sup>7</sup>In fact, they are. Contrary to the Ninth Circuit's holding, the Council is not the creature of an interstate compact. As Judge Beezer demonstrated in his dissent, the Council's creation does not fit the classic indicia of an interstate compact: (1) its operation throughout the Pacific Northwest can be triggered by the appointment of members by only three of the four states represented; (2) its jurisdiction affects several more states, not represented; and (3) none of the represented states is bound to continue its participation. 786 F.2d at 1372; *see also* *Northeast Bancorp, Inc v. Federal Reserve Bd.*, 105 S. Ct. 2545, 2554 (1985).

(footnote continued on next page)

will. This substantive result cannot be reconciled either with the Framers' original understanding of the dual role the Appointments Clause plays in our federal system of divided power, or with the principle of the supremacy of national law, as established by this Court's many decisions. Cf. *Buckley*, *supra*, n.7, 424 U.S. at 125-26 (Appointments Clause requirements not a matter of "etiquette" but "substantive"); *Washington v. United States*, 460 U.S. 536, 544 (1983) (resolution of supremacy questions must not "elevate form over substance").

The Framers' fundamental goal was to create an effective, enduring national government. *E.g.*, C. Warren, *THE MAKING OF THE CONSTITUTION* 4 (1937 ed.). The primary impetus was the danger, in the middle 1780's, that deficiencies in the Articles of Confederation would lead to a breakup of the United States along regional lines. *Id.* at 23-30. Those deficiencies included the requirement of "the concurrence of 13 distinct sovereign wills . . . [for] the complete execution of every important measure" passed by the confederation government. *THE FEDERALIST* NO. 15 (A. Hamilton) at 98 (J. Cooke ed. 1961). The effective restructuring of the national government was thought to require assuring that "the execution of the laws of the national government" could "pass into immediate operation upon the citizens themselves, without the interposition of state" will. See *THE FEDERALIST* NO. 16 (A. Hamilton) at 103. This, in turn, was believed to depend on sufficient "energy" in the execution of

---

Nor would it matter if the Council were a compact creation. Congress' compacts power is merely another legislative power that is subject to Appointments Clause requirements. Compare Art. I, § 10, cl. iii (compact power) with *Buckley v. Valeo*, 424 U.S. 1, 131-33 (1976) (*per curiam*). The Appointments Clause is concerned with the substantive issue of who controls the government functions that an executive officer performs. See *Bowshe v. Synar*, 106 S. Ct. 3181, 3188-89 (1986); *Buckley*, 424 U.S. at 125-26; *Synar v. United States*, 626 F. Supp. 1374, 1400 (Scalia, Johnson, Gasch, JJ.), *aff'd*, *sub. nom. Bowshe*, *supra*. Here, the substantive result of the Council's appointment by state governors is to place in the states' hands control over the government functions BPA's Administrator performs.

that law. *See* THE FEDERALIST NO. 70 (A. Hamilton) at 423. Assuring such energy was thought to require assuring the executive control over the appointment of his or her officers: The Framers recognized that "good laws are of no effect without a good executive," and that "there can . . . be no good executive without a responsible appointment of officers to execute." 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION 538-39 (1911 ed.) ("Farrand") (James Wilson). *See generally id.* at 41-44, 80-83, 314-15, 339.

However, the Framers also recognized that strengthening the national government could threaten the liberties recently won from Great Britain. In particular, the Framers feared the threat posed by enhancing the national government's legislative power. They saw that, under the state constitutions of the day, "[t]he legislative department [was] every where extending the sphere of its activity, and drawing all power into its impetuous vortex . . . ." THE FEDERALIST NO. 48 (J. Madison) at 333. This experience had led them to conclude that the greatest threat to liberty under "republican governments" was "the tendency to an aggrandizement of the legislative, at the expense of the other departments . . . ." *See* THE FEDERALIST NO. 49 (J. Madison) at 341; *see also* *Bowsher, supra*, n.7, 106 S. Ct. at 3189; *Buckley*, 424 U.S. at 129. The Framers were determined not to make what they believed was the mistake of the state constitution authors who, reacting to the abuses of an "hereditary [executive]," had forgotten the danger of "legislative usurpation." THE FEDERALIST NO. 49 at 341.

The Framers believed a proper division of authority — of separation of powers — would provide sufficient insurance against this threat. For the Executive branch, the Framers saw a strong power to appoint officers as key to preventing legislative encroachment. *See* THE FEDERALIST NO. 51 (J. Madison) at 348; THE FEDERALIST NO. 77 (A. Hamilton) at 516-17; *see also* *Buckley*, 424 U.S. at 272 (White, J., concurring). More generally, the Framers also relied on a proper division of authority between the state and national governments. As James Madison described the result in THE

FEDERALIST NO. 51: "In the Compound Republic of America, the power surrendered by the people, is first divided between the two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence, a double security arises to the rights of the people . . . ." *Id.* at 35.

The Framers, however, did not believe this double security was neatly separable. On the contrary, they thought that a failure in one area could fatally undermine their efforts in the other. This is clearly demonstrated in the Framers' debates over the Executive's appointment power. Not everyone at the Constitutional Convention was happy with the prospect of a strong executive, and some were particularly fearful of the "formidable" nature of the appointment power proposed. 2 Farrand at 405 (Edmund Randolph). In an attempt to reduce appointment power, an amendment was offered, permitting the Legislative branch to delegate appointment power to state governors. *See id.* at 406 (proposed by John Dickinson and Edmund Randolph, as revised by John Sherman). *The amendment was defeated. Id.* at 406, n.12, 407, n.12, 419, n.15. The objections to it demonstrated the Framers' belief that merely diluting the prerogatives of one branch of the national government, without directly transferring them to another, could endanger the effectiveness of the separation of powers. As Gouverneur Morris of Pennsylvania put it, permitting the Legislative branch to authorize state governor appointment of those executing the laws of the United States would be giving the states the power to say, "you shall be viceroys but we shall be viceroys over you." 2 Farrand at 406.<sup>8</sup>

<sup>8</sup> Rejecting this attempt to dilute executive power was consistent with the Framers' resistance throughout the Convention to proposals that threatened to weaken executive effectiveness. For example, the Framers believed that a unitary executive was essential to assuring energy in the execution of national law. THE FEDERALIST NO. 70 at 424, 427. The Framers therefore rejected proposals for a three person executive drawn from separate regions, 1 Farrand at 66, 71-74, 88, 91-92, 97, and proposals that, while maintaining the formality of a unitary executive, undermined its prerogatives by creating bodies of

(footnote continued on next page)



The Framers' refusal to permit Congress to delegate Executive appointment prerogatives to state governors demonstrates the indefensibility of the Ninth Circuit's wooden compartmentalization of "federalism," on the one hand, and "separation of powers," on the other.<sup>9</sup> As the Framers' action confirms, questions of federalism are questions about the separation of powers as well, for in our system of government

---

counselors with the power to check the executive's actions (e.g., a body of representatives of the country's regions). 2 Farrand at 335-337, 533, 537, 542. The Framers believed that effective unity could be destroyed, even though formally preserved, when an individual was subject, in whole or in part, to the controlling cooperation of others. See THE FEDERALIST NO. 70 at 424. These proposals, like the proposal to permit Congress to delegate the appointment power to state governors, suffered from a double defect: (1) they would upset the balance of power within the national government, raising the specter of legislative tyranny; and (2) they would create a structural impetus for the disintegration of the unity of national law, by effectively subjecting that law to unlimited state control.

\* It also demonstrates the indefensibility of a related formalism; the Ninth Circuit's holding that "the balance of powers between Congress and the President is unaffected" by anything except a Congressional attempt to arrogate to *itself* the power to appoint (or remove) an executive officer. See 786 F.2d at 1365. The Framers' express rejection of permitting Congress to delegate the Executive's appointment power to state governors confirms the plain meaning of Madison's statement in THE FEDERALIST NO. 47: "[w]ere the federal Constitution . . . really chargeable with [an] accumulation of . . . all powers legislative, executive and judiciary in the same hands . . . or with a mixture of such powers having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system." *Id.* at 324 (emphasis added). Madison and his colleagues recognized that the principle of the separation of powers could be violated by *either* "an actual consolidation" or "too great a mixture" of the different powers. *Id.* at 331; see also *Buckley*, 424 U.S. at 161-62 (striking down appointment of Federal Elections Commission even though President retained power to appoint two of six voting members). Stripping the Executive of its appointment power and granting it to a third party may not directly strengthen Congress, but it directly weakens the Executive vis-a-vis Congress: a substantively indistinguishable result in the Framers' eyes.

the separation begins with the division of power between the state and national governments. See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 439 (1946); *Tennessee v. Davis*, 100 U.S. 245, 266-67 (1880); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819). The Ninth Circuit ignored this fundamental principle and sanctioned a congressional power to dilute Executive appointment prerogatives which the Framers expressly rejected.<sup>10</sup>

Such a power also conflicts with the principle of national supremacy, established by this Court's many decisions. That principle is a logical implication of the structure of our federal system. *Mayo v. United States*, 319 U.S. 441, 445 (1943); *Clallam County v. United States*, 263 U.S. 341, 344 (1923); *McCulloch*, 17 U.S. at 426. National supremacy assures uniform administration of national law, thereby avoiding the balkanization (and breakup) of our federal system. *Mayo*, 319 U.S. at 445; *Davis*, 100 U.S. at 266; *Farmers & Mechanics Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875). National supremacy requires the national government be independent of, and therefore free of control by, the states. *Van Brocklin v. Anderson*, 117 U.S. 151, 155 (1886); *New York ex rel. Bank of Commerce v. New York City and County Comm'rs for Taxes and Assessments*, 67 U.S. (2 Black) 620, 632 (1863); *McCulloch*, 17 U.S. at 427, 432. The states therefore may neither tax nor otherwise regulate the national government's instrumentalities. Compare, e.g., *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 395 (1983); *United States v. Mississippi State Tax Comm'n*, 421 U.S. 599, 604 (1975); *Colorado Dept. of Employment v. United States*, 385 U.S. 355,

<sup>10</sup> The Ninth Circuit refused to address the Framers' rejection of congressional delegation of the Executive's appointment power to state governors, even after: (1) the Framers' action was raised by the United States and the Petitioners, in their briefs filed before oral argument, *United States Br.* at 18-19, n.5; *Petitioners Reply Br.* at 22-23; (2) it was raised again by the United States and the Petitioners, in their petitions for rehearing, *United States Pet.* at 11, p. 6; *Petitioners Pet.* at 3-4, p. 2; and (3) it was incorporated by special order in Judge Beezer's dissent. See Order (June 11, 1986) (reproduced in Appendix B); 786 F.2d at 1374, n.3.

358 (1966) (invalidating taxation), *with, e.g., Mayo*, 319 U.S. at 447; *Johnson v. Maryland*, 254 U.S. 51, 53 (1920); *Farmers & Mechanics Nat'l Bank*, 91 U.S. at 33 (invalidating regulation).<sup>11</sup>

The operative principle in supremacy jurisprudence is the same as that articulated by Gouverneur Morris in his successful opposition to permitting Congress to delegate the Executive's appointment power to state governors: the states cannot be permitted to become the viceroys over the intended viceroy for execution of national law—the federal Executive. The notion of the states controlling federal executive authority in our federal system is the antithesis of supremacy. *Van Brocklin*, 117 U.S. at 155; *Weston v. Charleston*, 27 U.S. (2 Pet.) 449, 465-66 (1829). Such control creates an intolerable risk of the politically irresponsible exercise of power, to the disadvantage of the national interest. When a state acts under its general law, it binds its citizens as well as others within its jurisdiction. However, when a state exercises authority over the national government, it is regulating something without representation in state government — the national interest. The resulting (likely irresistible) temptation to abuse the national interest for local advantage is precisely the evil the Framers sought to eradicate in forming “a more perfect union.” The principle of supremacy of national law is an essential means to that end, because it forbids discriminatory

<sup>11</sup> Admittedly, the scope of this immunity has been disputed over the years. *See, e.g., United States v. Fresno County*, 429 U.S. 452, 457-464 (1977). However, this Court has consistently held that national supremacy has two, minimum components: (1) the states presumptively may not tax or otherwise regulate the governmental operations of the national government, *e.g., United States v. New Mexico*, 455 U.S. 720, 733-735 (1982); *Thomson v. Union P. R.R.*, 76 U.S. 579, 589 (1870); *McCulloch*, 17 U.S. at 436; and (2) the states may not discriminate against national rights and powers. *E.g., Memphis Bank & Trust Co.*, 459 U.S. at 398; *Phillips Chem. Co. v. Dumas Indep. School Dist.*, 361 U.S. 376, 377 (1960); *Testa v. Katt*, 330 U.S. 386, 392-93 (1947). At the least, the states are barred from regulating national rights and powers standing alone. *Fresno County*, 429 U.S. at 703; *Nash v. Florida Indus. Comm'n*, 389 U.S. 235, 239-40 (1967); *North Dakota ex rel. Flaherty v. Hanson*, 215 U.S. 515, 524 (1910).



state control over the national rights and powers. See *Washington*, 460 U.S. at 545-46; *Fresno County, supra*, n.11, 429 U.S. at 458-59, 463 n.11, 464; *McCulloch*, 17 U.S. at 428-29, 435.<sup>12</sup>

The Ninth Circuit's holding violates all of these principles. BPA is a core executive agency: its Administrator is appointed by the Secretary of Energy, with no limit placed on the Secretary's (and therefore the President's) power of removal. 16 U.S.C. § 832a(a); see *Bowsher*, 106 S. Ct. at 3188. The Council's power extends only over BPA: the Act expressly frees the states from any obligation to conform to the Council's plan. The result is that the states, through the Council, have been made the viceroys over BPA's execution of the Act. This is precisely what the Framers feared might result if Congress were permitted to delegate the Executive's appointment power to state governors. The Council's appointment by state governors cannot be reconciled with the supremacy implications of the Appointments Clause. Given the increasing demands for state control over the execution of national law

---

<sup>12</sup> Congress has some power to waive the national Executive's immunity from state control, at least when the intention to waive that immunity is clearly and unambiguously expressed. *Hancock v. Train*, 426 U.S. 167, 179 (1976); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954). However, this Court has indicated that Congress' waiver power may be subject to constitutional limits. *Federal Land Bank v. Kiowa County Bd. of Comm'rs*, 368 U.S. 146, 149 (1961); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 478 (1939); cf. *Garcia v. San Antonio Metropolitan Transp. Auth.*, 105 S. Ct. 1005, 1016, 1020 (1985). Such limitations are particularly appropriate when the regulation of the national right or power at issue is a product of combined congressional-state action. Cf. *Prudential Ins. Co.*, 328 U.S. at 434-35, 439. The Framers, after all, rejected giving Congress an unlimited power to subject the national Executive to state will through delegation of the Executive's appointment prerogative. Thus, while Congress may subject the national Executive to the non-discriminatory exercise of general state law, see, e.g., *California v. United States*, 438 U.S. 645, 650, 652, n.7 (1978), it may not subject the national Executive to politically irresponsible state power. Cf. *McCulloch*, 17 U.S. at 428.

in a wide array of areas, now is the time to prevent an unraveling of the fabric of our system of divided powers.<sup>13</sup>

---

<sup>13</sup> The Ninth Circuit, in upholding the Council's appointment by state governors, concluded by extolling the virtues of "cooperative federalism," particularly under interstate compacts. 786 F.2d at 1366. However (and again assuming the Council is a creature of an interstate compact, *but see, supra*, n.7), this suggestion that the utility of the Council's present manner of appointment should matter in determining its conformity with the separation of powers ignores that the utility of a particular measure or action cannot exempt it from the mandate of the separation of powers, including the requirement of national supremacy. Compare, e.g., *Bowsher*, 106 S. Ct at 3193-94 with *Free v. Bland*, 369 U.S. 663, 666 (1962).

Consistent with its injection of the utility of state governor appointment to efforts at "cooperative federalism," the Ninth Circuit claimed striking down the Council's appointment would "outlaw virtually all compacts. . . ." 786 F.2d at 1365. This is incorrect. Numerous compacts function effectively without the benefit of any control over the national Executive. *E.g.*, 42 Stat. 174, 180 (1921) (Port Authority of New York Compact). Many others function effectively while exercising only non-discriminatory authority over the national Executive. *E.g.*, 75 Stat. 688, 702-03 (1961) (Delaware River Basin Compact).

However, the problem posed by the Council for the separation of powers is not an isolated one. *See, e.g.*, 33 U.S.C. §§ 1501-1524 (Deep Water Ports Act), 1508 (state governor veto over port location approved by Secretary of Transportation). Moreover, the Congress is considering legislation to permit Council-like state authorities to be set up (by compact) across the United States. *See* H. R. 3074, 99th Cong., 1st Sess. (July 24, 1985) (proposed Regional Conservation and Electric Power Planning and Regulatory Coordination Act of 1985). Permitting the Ninth Circuit's decision to stand will only postpone the day of reckoning. Failure to act now will likely leave this Court a task of Augean proportions when it moves to restore the Framers' intended separation of powers. *Cf. INS v. Chadha*, 462 U.S. 919, 944-45, (Opinion for the Court), 1003-1015 (Appendix to dissenting opinion of White, J.).

**2. The Ninth Circuit's Holding Exempting the Council From National Environmental Policy Act and State Environmental Impact Statement Requirements Ignores the Act's Mandate for Environmental Review, Conflicts with Other Circuit Court Tests for Substantial Impact, and Erodes Important Environmental Protections.**

The Council maintains it need not comply with either state or federal environmental law (and may perform such limited environmental review as it sees fit), because it is neither a state nor a federal agency, but rather a creature of an interstate compact. The Ninth Circuit agreed with the Council that its purported status as an interstate compact agency relieved it from complying with state EIS requirements. The Ninth Circuit also found the Council's Plan lacked the requisite substantial impact to trigger federal EIS review. The practical result is that no environmental law requirements apply to the Council. This is contrary to the Act, a departure from the decisions of other Circuit courts and this Court, and endangers important regional and national environmental protections.

***a. Congress Intended Council Compliance with Environmental Review Requirements, Irrespective of the Council's Status as a State or Federal Agency.***

The Act's declared purposes include assuring environmental quality. 16 U.S.C. § 839(3)(C). The Act expressly requires its construction consistent with applicable environmental laws. 16 U.S.C. § 839. The Act does not exempt the Council from EIS requirements. Yet the Ninth Circuit relieved the Council of any EIS obligation, placing great emphasis on the Council's supposed status as an interstate compact agency. 786 F.2d at 1371.

The Ninth Circuit erred in relying on the Council's status to grant it an exemption from EIS requirements. Even assuming the Council is an interstate compact agency, *but see, supra*, n.7, it is subject to the conditions Congress imposed in the Act. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359

U.S. 275, 281-82 (1959). The Council therefore must comply with the Act's directive that its purposes "be construed in a manner consistent with applicable environmental laws." 16 U.S.C. § 839.<sup>14</sup>

At issue is which environmental law applies. If, as the Ninth Circuit claims, the Council is a compact, "the state-created agency of each state," 786 F.2d at 1371, then state law applies. Wash. Rev. Code § 43.21C.030(2) ("all branches of government of this state... including state agencies"); Mont. Rev. Code Ann. § 75-1-201(1)(b) ("all agencies of the state"). If the Council functions as an agency of the four states, though not under a compact, state law still applies. Wash. Rev. Code § 43.21C.030(2); Mont. Rev. Code Ann. § 75-1-201. On the other hand, if the Council is a federal agency, *see* 786 F.2d at 1373 (Beezer, J., dissenting), it is subject to federal environmental law requirements. 42 U.S.C. § 4332. This Court has held:

NEPA's instruction that all federal agencies comply with the impact statement requirement... "to the fullest extent possible," 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather, the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle. [T]he Senate and House conferees [stated:]

<sup>14</sup> This does not, as the Ninth Circuit claimed, involve a state imposing its own law on a compact. 786 F.2d at 1371. Congress, not the states, required compliance with environmental laws when it passed the Act. "The states who are parties to the compact by accepting it and acting under it assume the conditions that Congress under the Constitution attached." *Petty*, 359 U.S. at 281-82. All four states expressly agreed to act pursuant to the Act. Idaho Code § 61-1201 ("Idaho agrees to participate in the formation of the [Council]... created pursuant to the [Act]"); Mont. Code Ann. 90-4-401 ("Montana agrees... to the performance of the functions and duties... as provided in the [Act]"); Or. Rev. Stat. 469.800 ("Oregon agrees to participate in the formation of the [Council] pursuant to the [Act]"); Wash. Rev. Code § 43.52A.030 ("[Washington's Council members] shall undertake the functions and duties of members of the Council as specified in the Act...").

*"[N]o agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance."* 115 Cong. Rec. 39703 (1969) (House conferees).

*Flint Ridge Dev. Co. v. Scenic Rivers Asso'n*, 426 U.S. 761, 787-88 (1976) (emphasis added). The Ninth Circuit's exemption of the Council from any EIS requirement ignores Congress' intent underlying the Act and the general presumption favoring EIS review.

***b. The Ninth Circuit's Holding that the Council's Plan Does Not Have a Substantial Environmental Impact Conflicts with Other Circuit Court Tests for Substantial Impact.***

The Ninth Circuit also held that the Council's Plan was not a "substantial federal action affecting the human environment." 786 F.2d at 1371. Yet the Plan directs BPA to acquire between 1,000 and 11,000 megawatts of electric energy resources throughout the region. Plan Vol. I, figs. 5-1 to 5-4. The Ninth Circuit's test for substantial impact conflicts with that of other Circuit courts, which require far less impact to mandate preparation of an EIS. *E.g.*, *Sierra Club v. Lynn*, 502 F.2d 43, 57-58 (5th Cir. 1974) *cert. denied*, 421 U.S. 994 (1975) ("HUD's commitment to guaranty 18 million dollars in [housing] bond obligations . . . constituted a major federal action 'significantly affecting the quality of the human environment' "); *WATCH v. Harris*, 603 F.2d 310, 317, 326 (2d Cir. 1979) ("the granting of approval for acquisition or demolition of any property was a 'major federal action . . . ' "); *National Helium Corp. v. Morton*, 455 F.2d 650, 656 (10th Cir. 1971) (the National Environmental Policy Act "requires the Department of Interior to comply with its provisions having to do with a depletable resource [helium]").<sup>15</sup>

<sup>15</sup> This is not a mere factual discrepancy. The different treatment of impacts of such dramatically different magnitudes renders the approaches of the Ninth Circuit and the other Circuits irreconcilable. They are applying different standards of law.



***c. The Ninth Circuit's Holding Erodes Important Environmental Protections.***

Environmental laws protect interests of paramount importance to the people of the region and the nation. 42 U.S.C. § 4332; Mont. Rev. Code Ann. 75-1-103; Wash. Rev. Code 43.21C.020. By allowing the Council to disregard EIS requirements under the cloak of an interstate compact, the Ninth Circuit threatens the enforcement of environmental (and other laws) of vital state and federal importance whenever compacts are used. By finding no substantial impact, the Ninth Circuit endangers EIS effectiveness. As few if any actions will have impacts equal to those of the Plan, the Ninth Circuit's test for substantial impact effectively renders EIS requirements non-existent.<sup>16</sup>

**3. The Ninth Circuit has Permitted the Council to Eliminate, by "Reasonable Agency Interpretation," a Federal Statutory Requirement That Protects Housing Consumers Against Hundreds of Millions of Dollars in Excess Construction Costs.**

The Act requires the Plan to be *both* "cost effective for the region and economically feasible for consumers." 16 U.S.C. § 839b(f)(1) (emphasis added). The Council substituted its own interpretation of the Act's requirement that the MCS be "economically feasible for consumers" in place of the intent Congress expressed in the legislative history. The Ninth Circuit affirmed the Council's interpretation.

"Economically feasible for consumers" is not defined in the Act. To understand the legislative history of the Act, one

---

<sup>16</sup> The Ninth Circuit's holding could lead other circuits to misinterpret and misapply NEPA, and lead the courts of states with statutes patterned after NEPA to misapply their statutes: "At least 14 states and Puerto Rico have passed little NEPAs." M. Boher, J. Noming & R. Morrison, ENVIRONMENTAL IMPACT STATEMENTS: A GUIDE TO PREPARATION AND REVIEW 35, n.56 (1977 ed.).

must first understand the definition of the other standard an MCS measure must satisfy — "cost-effective for the region." One must also understand the difference between the two standards.

A conservation measure or resource is "cost-effective for the region" only if it produces or saves electricity "at an estimated incremental system cost no greater than that of the least-cost similarly reliable measure or resource, or any combination thereof." 16 U.S.C. § 839a(4)(A). This means a conservation measure is "cost-effective for the region" when it is the cheapest means of meeting increased electric power demand.

The legislative history of the Act establishes that "economically feasible for consumers" and "cost-effective for the region" are distinct standards with important differences. "Economically feasible for consumers" tests conservation from the consumer's perspective; "cost-effective for the region" tests conservation from the region's perspective. "Economically feasible for consumers" is founded on the concept of "average" cost; "cost-effective for the region" is founded on the concept of "marginal" cost. See House Interior Report at 43; 126 *Cong. Rec.* H9853 (daily ed. Sept. 29, 1980) (remarks of Rep. Swift).

When electric rates are set, low cost resources, such as a hydroelectric dam built in 1935, are averaged with high cost resources, such as a coal-fired electric power plant built in 1986. The overall effect on consumers is an electric power rate reflecting the average cost of electricity produced by both the dam and the coal plant. Thus, "economically feasible for consumers" compares the cost of an MCS measure to average cost electric rates.

By contrast, one looks to the marginal cost of a resource to determine if it is "cost effective for the region." *Id.* The marginal cost of electric energy is the cost of producing the last unit of energy. Marginal cost is also known as "avoided cost." Regional marginal cost is the long-run cost of additional consumption to the region due to additional resources being required.



A resource can be "cost-effective for the region," yet fail to be "economically feasible for consumers." For example, assume that the region pays 1¢ per kilowatt hour ("¢/kwh") for 1 megawatt of hydropower, 2¢/kwh for 1 megawatt of conservation, and 3¢/kwh for 1 megawatt of geothermal generated electricity. Also assume the region needs 1 more megawatt, and that the cheapest resource available is a conservation measure costing 4¢/kwh. The 4¢/kwh which the *region* must pay for its last needed megawatt is the *marginal cost*. After it is purchased, *consumers* will pay electric rates of 2.5¢/kwh, which is the *average cost* of all four megawatts. The 4¢/kwh conservation measure would be cost-effective for the region, because it is cheaper than all alternatives. However, the 4¢/kwh conservation measure would not be economically feasible for consumers because, at 4¢/kwh, it is more expensive than the 2.5¢/kwh average cost electricity it would save.

Congress recognized that the marginal cost of electric resources could be greater than the cost of previously-acquired resources. Congress also recognized that, under such circumstances, there would be a gap (like that in the foregoing example) between what is cost-effective for the region and what is economically feasible for consumers. If both standards are to be achieved, consumers must be reimbursed for the amount of that gap. Congress intended that no conservation measure be imposed on consumers unless they were reimbursed for that amount. The final House report stated:

These standards are to be designed to produce all power savings that are cost effective for the region and economically feasible for consumers through financial assistance made available under this legislation. Consumers will therefore bear the cost of conservation measures that are cost-effective in terms of the electric rates consumers pay, while the cost of the additional increment of conservation that is cost-effective to the region will be met through financial assistance that BPA is required to provide under section 6(a) [16 U.S.C § 839d(a)].

House Interior Report at 43. Congressman Swift explained:

[T]he standards themselves will be based on marginal cost, and . . . [BPA's] Administrator will make available the financial assistance that will ensure these standards are

attained. Without this provision, the economically feasible level of the conservation for consumers would be less . . .

126 *Cong. Rec.* H9853 (daily ed. Sept. 29, 1980)

The Council originally conceded that Congress required reimbursement for the amount of any gap as a pre-condition for implementing conservation measures. See Council minutes and meeting transcript excerpts reproduced in Appendices U through X. The Council, in its Plan, declined to do what it had admitted it was bound to do. The Plan requires new homes to use all conservation measures costing no more than 4¢/kwh. Plan Vol. I, 10-4. This is the region's *marginal* cost of electricity. See Plan Vol. I, 7-1. Hence, when it used the 4¢/kwh marginal cost of electricity to test conservation's economic feasibility for consumers, Plan Vol. IV, 112-114, the Council was in fact applying the test for cost-effectiveness for the region. As explained above, the test for cost-effectiveness for the region is based upon the *marginal* cost of electricity, whereas the test for economic feasibility for consumers is based on the *average* cost of electricity, which is what consumers actually pay.

The Ninth Circuit endorsed this belated departure from congressional intent. The Ninth Circuit stated:

The Council believes that *marginal* cost is a more accurate measure of energy cost than is *average* cost because of differences in market price for different consumers. See Plan Vol. I at 4-6. Furthermore, economic efficiency should be based upon avoided cost which is measured by *marginal*, not *average*, cost.

786 F.2d at 1369 (emphasis added). The Ninth Circuit's and the Council's substitution of a standard based on marginal cost directly contravenes Congress' clearly expressed intent that consumers will bear only the cost of measures "that are cost-effective in terms of the electric rates consumers will pay." House Interior Report at 43 (emphasis added). Even if this method were more reasonable than what Congress intended, the Council (and the Ninth Circuit) must comply with Congressional intent. *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 461 (1985).

To sustain the Council's actions, the Ninth Circuit substituted its own notion of "economic efficiency" for the Act's standard of "economically feasible for consumers." 786 F.2d at 1369. Yet nowhere do the Act or the legislative history discuss "economic efficiency." The Ninth Circuit cites portions of the history that address "cost-effectiveness for the region," not "economic feasibility for consumers." See 126 *Cong. Rec.* S14692 (daily ed. Nov. 19, 1980) (remarks of Sen. Jackson) (justifying conservation's 10% cost advantage in the definition of "cost-effective for the region"); House Commerce Report, *supra*, n.1 at 50 (explaining definition of "cost-effective for the region"). The Ninth Circuit also cites the Senate Report that dealt with an earlier draft of the Act, which required conservation only to be "cost effective for consumers." Senate Report at 21. The Ninth Circuit ignored that Congress *later* recognized that such a standard jumbled together two independent concerns, so Congress *substituted* the *two* criteria of "cost effective for the region" and "economically feasible for consumers" for the *single* test, "cost effective for consumers." Compare *id.* at 25 to 16 U.S.C. § 839b(f)(1).<sup>17</sup>

By equating its own notion of "economic efficiency" with "economically feasible for consumers," the Ninth Circuit has given "economically feasible for consumers" and "cost-effective for the region" the same meaning. 786 F.2d at 1369. Yet the Act requires the MCS to meet *both* tests. 16 U.S.C. § 839b(f)(1). If "economically feasible for consumers" is to mean anything, it must be different than "cost-effective for the region." No statutory provision should be construed as a redundancy, when it can be given full effect. *E.g., Stephens v. Cherokee Nation*, 174 U.S. 445, 480 (1899).

The Ninth Circuit incorrectly suggested that it may uphold an agency interpretation merely because it is reasonable. 786 F.2d at 1366-67, 1369. It overlooked the rule that when congressional intent is apparent, it must be followed. *United States v. Clark*, 454 U.S. 555, 560 (1982). By contrast, in *Chevron USA, Inc. v. NRDC*, 104 S. Ct. 2778, (1984), this Court deferred to a reasonable agency interpretation *only* after

<sup>17</sup> Although the Petitioners brought this to the court's attention in the petition for rehearing, see Pet. at 10-12 (Appendix T), the Ninth Circuit declined even to address it.

concluding that "Congress did not actually have an intent." *Id.* at 2783.<sup>18</sup> Neither the Council nor the Ninth Circuit followed congressional intent.

The failure of the Council and the Ninth Circuit to follow congressional intent has serious consequences for the region and the nation. The MCS are invalid because the Council did not test them by both standards. As a result, the Council and the Ninth Circuit have upset Congress' planned allocation of costs, and consumers of new housing will bear an inordinate burden. While the MCS remain in effect, each of the tens of thousands of consumers who annually buy homes in the region<sup>19</sup> will be forced to pay thousands of dollars for conservation measures,<sup>20</sup> many of which cost more than they save.<sup>21</sup> These costs will badly injure the region's home buyers, housing industry, and economy. They will deprive tens of thousands of families of the chance to own their own

<sup>18</sup> "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *Riverside Bayview Homes, Inc.*, 106 S. Ct. at 461 (emphasis added).

<sup>19</sup> An estimated average of 85,000 new single-family homes and 24,000 multi-family homes will be built in the region each year from 1986 to 2002, when the Plan begins and ends. A total of 1,445,000 new single-family homes and 408,000 new multi-family homes are projected to be built in the region during the life of the Plan.

<sup>20</sup> The standards will be very expensive. For example, the Council estimates that the conservation requirements for space heating alone will add \$1,900 to the cost of a single-family home west of the Cascades, and \$3,000 east of the Cascades, in 1983 dollars. Plan Vol. II, Tables J6-1a, J6-1b, J6-1c, K-14 and K-15. The standards for space heating conservation will add approximately \$197 million to the cost of new single family housing during each year of the Plan, some \$3.35 billion during its 17-year course.

<sup>21</sup> The MCS require the region's new homes to include all conservation measures which would cost no more than 4¢/kwh of electricity saved, in 1983 dollars. Plan Vol. I, 10-4. Yet the Council's Own findings establish that, even in the Councils "extremely unlikely" high growth forecast, electric rates will never be higher than 3.6¢/kwh during the life of the Plan and, during most of the life of the Plan, electric rates will be considerably lower. Plan Vol. I, 5-15; Plan Vol. I, 4-3, fig. 4-4.

homes.<sup>22</sup> The resulting decline in the housing industry could seriously damage the region's economy, because housing has traditionally been a major generator of employment and a key to prosperity.<sup>23</sup>

The Ninth Circuit's suggestion that it may uphold an agency interpretation because it is reasonable, when coupled with its misapplication of the legislative history of the Act, sanctions the usurpation of legislative authority by an administrative agency. This is the mirror image of the problem created by Congress' violation of the Appointments Clause. Whereas the manner of the Council's appointment constitutes the usurpation by Congress and the states of authority granted by the Constitution to the federal Executive, the Ninth Circuit, by interpreting "economically feasible for consumers" to give it a meaning contrary to the intent of Congress, has sanctioned the Council's usurpation of congressional authority. It is no more legitimate for an administrative agency (or the judiciary) to encroach upon the authority the Constitution grants to Congress, than it is for Congress or the states to encroach upon the authority the Constitution grants to the federal Executive. This Court should send a clear message to the Council, the circuit courts, the Congress and the states that it will not tolerate either kind of encroachment.

### CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

JOHN W. HEMPELMANN  
*Counsel of Record, and*  
 PAUL SIKORA  
 MICHAEL B. KING  
 DIAMOND & SYLVESTER  
*Counsel for Petitioners*

October 6, 1986

<sup>22</sup> Every \$1,000 in extra cost to a living unit eliminates .9% of the home buyers from the market.

<sup>23</sup> The Council's data show that the region's construction industry as a whole employed 158,000 people in 1980. The Council did not determine how much of that employment was in the housing industry.



APPENDIX A

[1359] SEATTLE MASTER BUILDERS ASSOCIATION;  
Homebuilders Association of Spokane,  
Inc.; National Woodwork Manufacturers'  
Association; Fir & Hemlock Door Assoc-  
iation; Shelter Development Corporation;  
Clair W. Daines, Inc.; Conner Develop-  
ment Company; Donald N. McDonald;  
Seattle Door Company, Inc.; Homebuilders  
Association of Washington State,  
Petitioners,

v.

PACIFIC NORTHWEST ELECTRIC POWER AND  
CONSERVATION PLANNING COUNCIL  
(Northwest Power Planning Council)  
Respondent,

and

UNITED STATES OF AMERICA,  
Intervenor-Respondent.

No. 83-7585

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

Argued and Submitted May 9, 1985.

Decided April 10, 1986.

As Amended June 11, 1986.

[1362] Petition for Review of Final  
Action by the Northwest Power Planning  
Council.



Before GOODWIN, SCHROEDER and BEEZER,  
Circuit Judges.

GOODWIN, Circuit Judge:

A group of home builders and other industry representatives filed an original petition in this court seeking to strike down as unconstitutional both the Pacific Northwest Electric Power and Conservation Planning Council and the Council's 1983 Northwest Conservation and Electric Power Plan.

We have jurisdiction under the Pacific Northwest Electric Power Planning and Conservation Act, Pub L. 96-501, 94 Stat. 2697, 16 U.S.C. § 839 et seq. (1982) (the Act) and we uphold both the constitutionality of the Pacific Northwest Electric Power and Conservation Planning Council, a policy-making body established by that Act, and the validity of the Council's 1983 Northwest Conservation and Electric Power Plan.

Petitioners seek relief against two entities: the first is the United States government, which has intervened on behalf of the Bonneville Power Administration (BPA), an agency of the United States Department of Energy.<sup>1</sup> The second is the Council itself. BPA is statutorily charged with the production, marketing and distribution of electric power in the Pacific Northwest. See Bonneville Project Act, 16 U.S.C. § 832a. See generally BPA, Columbia River Power for the People: A History of Policies of the Bonneville Power Administration (1981). The Council's mandate is to prepare a conservation and electricity usage plan for the region served by

---

<sup>1</sup> Amicus briefs have been filed by the States of California, Oregon, Idaho, Montana and Washington, the City of Tacoma, Washington, the National Governors' Association and two public interest organizations.

the BPA and to develop a program for energy planning consistent with regional environmental and ecological concerns. § 839b(a)(1). Congress has consented to the establishment of the Council, § 839b(a), to be composed of the members appointed by the governors of Washington, Oregon, Montana and Idaho. Each state has agreed to participate in the Council, and has enacted legislation which authorizes the governor to appoint two members to the Council. Wash.Rev.Code Ann. § 43.52A.010; (1986); Or.Rev.Stat. § 469.800; (1985); Mont.Code Ann. § 90-4-401 (1985); Idaho Code § 61-1201 (1985).

The Act directs the Council to prepare a regional energy plan which is to provide

a general scheme for implementing conservation measures and developing resources . . . with due consideration by the Council for (A) environmental quality, (B) compatibility with the existing regional power system, (C) protection, mitigation,

and enhancement of fish and wildlife . . . and (D) other criteria which may be set forth in the plan.

§ 839b(e)(2). The Council adopted the final 1983 plan in April 1983. 48 Fed.Reg. 24,493 (June 1, 1983).

The Council and BPA operate independently of each other. Their functions directly overlap, however, under those portions of the Act which provide that certain BPA actions will be consistent with the Council's plan, §§ 839b(d)(2), 839b(h), 839c(d)(3), 839d(b), 839d(c); that the Council can request certain action of BPA, §§ 839b(f)(2), 839b(J); and that the Council can review BPA actions, § 839b(i). See Hemmingway, The Northwest Power Planning Council: Its Origins and Future Role, 13 Envtl.L. 673 (1983).

The petition raises several issues. First, it attacks the 1983 plan as arbitrary and capricious under the Act and the Administrative Procedure Act, 5 U.S.C. §

553 (1982). Second, petitioners attack the constitutionality of the Council itself, claiming that because the Council primarily influences federal, not state, government actions it constitutionally cannot be an interstate compact organization. Petitioners' third argument is that the Council violates the appointments clause, U.S. Const. art. [1363] II, § 2, cl. 2, because the Council exercises significant authority over the federal government but has not been appointed by the President.

#### I. The Council as a Compact Agency

The parties and amici disagree about whether to classify the Council as a federal agency or as an interstate compact organization. See U.S. Const. art I, § 10, cl. 3 ("compact clause"). Those attacking the Council as unconstitutional argue that it is a federal agency, despite the congressional disclaimer that it is

not a federal agency. § 839b(a)(2)(A)-(iv). Those who defend the constitutionality of the Council characterize it as a compact agency, outside the scope of the appointments clause. We hold that it is a compact agency and that its members are not "federal officers" within the meaning of the appointments clause.

Congress' intention is clear from both the language of the statute, § 839b(b), and from the legislative history, that the Council is not to be a federal agency and is not to be controlled by the federal government. 126 Cong.Rec. 30186 (1980) (remarks of Sen. McClure). The alternative establishment of the Council as a federal agency was a rejected second choice. § 839b(b). One of the principal purposes of the Council is to represent state concerns about regional problems; Congress deemed it undesirable for a federal agency to represent state concerns



to yet another federal agency. 126 Cong.Rec. 30181 (1980) (remarks of Sen. McClure) ("The Pacific Northwest does not need and candidly will not suffer lightly a federally imposed regional planning process with apparent input from Washington acting as a federal agency."). See also 126 Cong.Rec. 30181 (1980) (remarks of Sen. Hatfield); 126 Cong.Rec. 29808 (1980) (remarks of Rep. Dingell). Congress wanted to avoid conflicts with state law and to maintain accountability through the application of federal substantive and procedural law, see 126 Cong.Rec. 29808 (1980) (remarks of Rep. Dingell), but also wanted to avoid the potential constitutional problems of a federal agency composed of state appointees. H.R.Rep. No. 96-976 (Part II, 96th Cong., 2d Sess. 40-41 (majority views), 70-71 (supplemental views of Rep. Williams) (1980), U.S. Cong. & Admin.News

(1980) pp. 5989, 6038, 6039, 6063-6065; 126 Cong.Rec. 30186 (1980) (remarks of Sen. McClure).

The Supreme Court recently outlined some of the indicia of compacts. These are establishment of a joint organization for regulatory purposes; conditional consent by member states in which each state is not free to modify or repeal its participation unilaterally; and state enactments which require reciprocal action for their effectiveness. Northeast Bancorp, Inc. v. Board of Gov'rs of the Federal Reserve System, \_\_ U.S. \_\_, 105 S.Ct. 2545, 2554, 86 L.Ed.2d 112 (1985). Even if all these indicia of compacts are present, the only interstate agreements which fall within the scope of the compact clause are those "tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."

Cuyler v. Adams, 449 U.S. 433, 440, 101 S. Ct. 703, 707, 66 L.Ed.2d 641 (1981). "The relevant inquiry must be one of impact on [the] federal structure." United States Steel Corporation v. Multistate Tax Commission, 434 U.S. 452, 471, 98 S.Ct. 799, 811, 54 L.Ed.2d 682 (1978); see Virginia v. Tennessee, 148 U.S. 503, 13 S.Ct. 728, 37 L.Ed. 537 (1893). If the joint activity does not affect the federal sphere, no approval by Congress is needed. If it affects the federal sphere, then Congress must authorize the activity. Cuyler v. Adams, 449 U.S. at 440, 101 S.Ct. at 707.

The Council satisfies all these indicia. The Council is an operational body established by reciprocal legislation whose effectiveness is conditioned upon binding legislative commitments by the states.

Petitioners and amicus Pacific Legal Foundation argue that certain features of the Council are unusual and that this unusual nature militates in favor of considering the Council to be a federal rather than a compact agency. The two aspects of the [1364] Council that petitioners and amicus claim are unusual are, first, that congressional approval of the Council was accorded before the states agreed to form it, and, second, that the Council's activities directly affect a federal agency.

An unusual feature of a compact does not make it invalid. A leading article by Professors Frankfurter and Landis sets the tone for the modern use of compacts. It encourages new uses. "The combined legislative powers of Congress and of the several States permit a wide range of permutations and combinations for governmental action. . . . Political

energy has been expended on sterile controversy over supposedly exclusive alternatives instead of utilized for fashioning new instruments adapted to new situations." Frankfurter & Landis, The Compact Clause of the Constitution -- A Study in Interstate Adjustments, 34 Yale L.J. 685, 688 (1925).

Moreover, the two features of the Council emphasized by petitioners and amicus are not unusual. Courts have considered both. "Congress may consent to an interstate compact by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined." Cuyler, 449 U.S. at 441, 101 S. Ct. at 708. See, e.g., Flood Control Act of 1936, 49 Stat. 1570 (1936) 33 U.S.C. § 701d (1982); Crime Control Consent Act of 1934, 48 Stat. 909 (1934), 4 U.S.C. § 112(a) (1982). Congress also may grant

its consent conditional upon the states' compliance with specified terms. Cuyler, 449 U.S. at 439-40, 101 S.Ct. at 707-08. See James v. Dravo Contracting Co., 302 U.S. 134, 148 58 S.Ct. 208, 215, 82 L.Ed. 155 (1937).

It is also not unusual for the federal government to be involved in or to be directly affected by compact-created agencies. See, e.g., Washington Metropolitan Transit Regulation Compact, 74 Stat. 1031 (1960); Interstate Compact on the Potomac River Basin, 54 Stat. 748 (1940); Ohio River Valley Water Sanitation Compact, 54 Stat. 752 (1940); Upper Colorado River Basin Compact, 63 Stat. 31 (1949). Cf. Washington Metropolitan Area Transit Authority v. One Parcel of Land, 706 F.2d 1312, 1316 (4th Cir.), cert. denied, 464 U.S. 893, 104 S.Ct. 238, 78 L.Ed.2d 229 (1983) (federal government



delegates powers to a compact organization). The federal government has even participated as a member of interstate compact agencies. See, e.g., Delaware River Basin Compact, Pub.L. No. 87-328, 75 Stat. 688 (1961).

There is no bar against federal agencies following policies set by non-federal agencies. The federal government has in fact agreed to be bound by state law in several areas. See California v. United States, 438 U.S. 645, 656-57, 98 S.Ct. 2985, 2991-92, 57 L.Ed.2d 1018 (1978) (federal reclamation projects must follow state water laws); Hancock v. Train, 426 U.S. 167, 178-80, 96 S.Ct. 2006, 2012-13, 48 L.Ed.2d 555 (1976) (federal government must comply with state air pollution standards); see also Columbia Basin Land Protection Association v. Schlesinger, 643 F.2d 585, 604-06 (9th Cir. 1981) (federal government must comply

with state environmental standards); California v. EPA, 511 F.2d 963, 968-69 (9th Cir. 1975) (federal agencies must comply with state water pollution standards), rev'd on other grounds, 426 U.S. 200, 211-13, 96 S. Ct. 2022, 2027-29, 48 L.Ed.2d 578 (1976). The federal government can be subject to state law where there is a clear congressional mandate and specific legislation which makes the authorization of state control clear and unambiguous. Hancock, 426 U.S. at 179, 96 S.Ct. at 2012.

## II. Appointment of Council Members

Petitioners argue that, even if the Council is a valid compact organization, the appointments clause of the United States Constitution requires that Council members be appointed not by the state governors, § 839b(a)(3), but by the President because the Council exercises significant authority over the federal government. See U.S. Const. art. II, § 2,

cl. 2. The appointments clause is addressed to the separation of [1365] powers between the President and Congress. See Buckley v. Valeo, 424 U.S. 1, 126, 96 S.Ct. 612, 685, 46 L.Ed.2d 659 (1976). No court has yet held that the appointments clause prohibits the creation of an interstate planning council with members appointed by the states.

The Supreme [sic] Court in Buckley said that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must, therefore, be appointed" by the President. Id. Petitioners claim that appointment of Council members by the state governors violates Buckley.

Petitioners' theory, however, would outlaw virtually all compacts because all or most of them impact federal activities and all or most of them

have members appointed by the participating states. See, e.g., Washington Metropolitan Area Transit Authority, 706 F.2d at 1314.

The appointments clause applies to (1) all executive or administrative officers, 424 U.S. at 123-26, 96 S.Ct. at 684-86; (2) who serve pursuant to federal law, 424 U.S. at 126, 96 S.Ct. at 685; and, (3) who exercise significant authority over federal government actions. 424 U.S. at 126-27 & n. 162, 96 S.Ct. at 685 & n. 162. Unless all three prongs of the Buckley test are met, there is no violation of the appointments clause.

The council members clear the second Buckley element. The Council members do not perform their duties "pursuant to laws of the United States." See Buckley, 424 U.S. at 126, 96 S.Ct. at 685. Rather, the Council members perform their duties pursuant to a compact which requires both

state legislation and congressional approval. Without substantive state legislation, there would be no Council and no Council members to appoint. While congressional consent gives an interstate compact some attributes of federal law, the Council members' appointment, salaries and administrative operations are pursuant to the laws of the four individual states, within parameters set by the Act. §§ 839b(a)(3), 839b(a)(4). More important, the states ultimately empower the Council members to carry out their duties. Federal law provides congressional consent for formation of the Council as it does for the creation of all compacts and compact agencies. Federal law also affects the substance of Council policy decisions because the Act constrains Council policy-making, see §§ 839b(c), (d), (e), and subjects some Council operations to federal law. As with any

compact, congressional consent did not result in the creation but only authorized the creation of the compact organization and the appointment of its officials. The appointment, salaries and direction of the Council members are state-derived.

We need not reach the first and third Buckley elements. . The question, thus narrowed, because Council members do not serve pursuant to federal law, makes immaterial whether they exercise some significant executive or administrative authority over federal activity. It is likewise immaterial how their duties are classified: executive or administrative, because they perform these duties under a compact, rather than "federal law" within the meaning of Buckley.

Buckley is about maintaining the separation of powers within the federal government. This concern is not implicated here. In this case, unlike Buckley,



Congress has not arrogated to itself a power that would otherwise be exercised by the President. See also Synar v. United States, 626 F.Supp. 1374 (D.D.C. 1986) (per curiam) which holds the exercise of executive power by an officer who could be removed by Congress unconstitutional. The court in Synar stressed the "founders' often expressed fear 'that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches.'" Synar, 626 F.Supp. at 1401, quoting Buckley v. Valeo, 424 U.S. at 129, 96 S.Ct. at 687. Because Congress neither appoints nor removes the members of this Council, the balance of powers between Congress and the President is unaffected. [1366]

The Council violates neither the compact nor appointments clauses of the United States Constitution. The Act establishes an innovative system of

cooperative federalism under which the states, within limits provided in the Act, can represent their shared interests in the maintenance and development of a power supply in the Pacific Northwest and in related environmental concerns.<sup>2</sup>

### III. Validity of Council's Plan

Having concluded that the Council is constitutional, we examine the substance of the 1983 plan. In this action petitioners challenge only that portion of the 1983 plan which establishes model energy conservation standards for new residential construction. Consequently, we so limit the following discussion.

---

<sup>2</sup> For a thorough analysis and history of the constitutional position of such experiments in cooperative federalism, See Grad, Federal-State Compact: A New Experiment in Co-Operative Federalism, 63 Colum.L.Rev. 825 (1963) (discussing the federal role in the Delaware River Basin Commission).

A. Standard of Review

Congress directed that the Administrative Procedure Act, 5 U.S.C. §§ 701-06, govern our review of Council actions. Adoption of the plan is a final action subject to judicial review for the purposes of the Administrative Procedure Act. 16 U.S.C. § 839f(e)(1)(A); see 5 U.S.C. § 553.

While Congress intended that this court's scope of review of Council actions be consistent with 5 U.S.C. § 706, the Act specifically declines to require that the Council follow the hearing provisions of 5 U.S.C. §§ 554, 556, and 557, which govern formal rulemakings. § 839f(e)(2). Consequently, this court will use neither the substantial evidence standard, 5 U.S.C. § 706(2)(E), nor the de novo standard, 5 U.S.C. § 706(2)(F). The remaining subsection of 5 U.S.C. § 706 provides that an agency's factual findings

may be set aside if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). We adopt this standard of review.

Although this court generally reviews legal questions de novo, United States v. McConney, 738 F.2d 1195, 1201 (9th Cir.) cert denied, \_\_\_ U.S. \_\_\_, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984), amici have urged that we review the Council's interpretations of the Act under a more deferential standard. Amici argue the general rule that where a statutory interpretation is "a contemporary construction of a statute by [those] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly, while they are yet untried and new," a court should review a statutory construction deferentially. Amer. Paper Inst., Inc. v. Amer. Elec. Power Service

Corp., 461 U.S. 402, 422, 103 S.Ct. 1921, 1932, 76 L.Ed.2d 22 (1983), quoting Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). Under this deferential review, a court examines only the reasonableness of the interpretation, and "need not find that [the agency's] construction [of its enabling act] is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Amer. Paper Inst., 461 U.S. at 422-23, 103 S.Ct. at 1932-33; quoting Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136 (1946). See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

The Supreme Court has deferred to BPA interpretations of the Act. ALCOA v. Central Lincoln Peoples' Util. Dist., 467

U.S. 380, 104 S.Ct. 2472, 2479-80, 81 L.Ed.2d 301 (1984). This court has done likewise. See Department of Water and Power v. BPA, 759 F.2d 684, 690-91 (9th Cir. 1985); Central Lincoln Peoples' Util. Dist. v. Johnson, 673 F.2d 1076, 1078, as amended, 686 F.2d 708, 710-11 (9th Cir. 1982), rev'd on other grounds, 467 U.S. 380, 104 S.Ct. 2472, 81 L.Ed.2d 301 (1984); Columbia Basin Land Protection Ass'n, [1367] 643 F.2d at 599-600 (and cases cited therein).

The preparation and consideration of the plan is a matter within Council authority over which the Act accords the Council considerable flexibility. For the same reasons that we defer to BPA expertise in construing other sections of the Act, therefore, we will defer to the Council's interpretations of § 839b if reasonable.



B. Model Conservation Standards

The Act requires that the Council's plan afford priority to certain resources:

The plan shall . . . give priority to resources which the Council determines to be cost-effective. Priority shall be given: first, to conservation; second, to renewable resources; third, to generating resources utilizing waste heat or generating resources of high fuel conversion efficiency; and fourth, to all other resources.

§ 839b(e)(1).

The Act further requires that the plan include model conservation standards, § 839b(f)(1), § 839b(e)(3)(A). The Council is directed to adopt model conservation standards applicable to new and existing structures which reflect "geographic and climatic differences within the region" and which "produce all power savings that are cost-effective for the region and economically feasible for

consumers."<sup>3</sup> § 839b(f)(1) (emphasis added). The Act defines "cost effective" resources as those which are forecast "to be reliable and available . . . to meet or reduce the electric power demand . . . of the consumers . . . at an estimated incremental system cost no greater than that of the least-cost similarly reliable and available alternative measure or resource, or combination thereof." § 839a(4)(A). The Act defines the term "system cost" as an "estimate of all direct costs of a measure or resource over its effective life including [direct and

---

<sup>3</sup> The model conservation standards incorporated in the 1983 plan specify an energy performance budget for space heating. The energy performance budget does not require any particular building practice or components but instead mandates minimum overall energy efficiency and specifies several different approaches which builders can use to satisfy the performance standards. The energy budget is divided into three climatic regions depending upon the number of heating or cooling degree-days in the region.

quantifiable environmental costs and benefits]." § 839a(4)(B). Because the term "economically feasible" is not defined in the Act, the Council's definition is a major point of contention in this action.

Rather than making a single forecast of the need for energy resources, the plan makes four separate, 20-year forecasts of electricity demand, each with separate resource needs. Under the lowest-growth forecast, conservation is the only new energy resource needed to satisfy regional energy demand.<sup>4</sup> Plan Vol. 1 at 5-2 (figure 5-1). Under the

---

<sup>4</sup> The Act treats conservation as an energy resource just as any other energy resource. Conservation is unusual, however, because it is not constructed by a utility with predictable costs and output. Determining the value of conservation as an energy resource is one of the complex theoretical problems which the plan confronts.

medium-low, medium-high and high-growth forecasts, demand is satisfied by a mixture of conservation, hydro-electric, cogeneration, coal and combustion turbine energy sources in accord with statutory priorities. Id. (figures 5-2, 5-3, 5-4).

The Council has predicted the probability that each of these growth forecasts will be realized. It has predicted that it is "very unlikely" that growth will be slower than the low-growth forecast or faster than the high-growth forecast. The plan predicts a 33 per cent chance that growth will be more than the low forecast but less than the medium-low forecast; a 45 per cent chance of growth falling between the medium-low and medium-high forecasts; and a 22 per cent chance that growth will exceed the medium-high forecast but be less than the high forecast.

Plan Vol. 1 at 5-17 (and figures 5-13, 5-14).

The 1983 plan predicts that the last resource to be acquired under the high [1368]-growth forecast will be a coal generating plant capable of producing electricity at a cost of slightly over four cents per kilowatt hour (4¢/kwh). The plan considers that conservation measures which "could displace this coal plant would be considered cost-effective." Plan Vol. 1 at 7-1. It defines as cost effective, therefore, any conservation measure with a marginal cost less than 4¢/kwh in current dollars. Id.

The Council concluded that its conservation standards are both cost effective for the region and economically feasible for consumers under § 839b(f)(1) and recommended that BPA impose a surcharge for nonconforming electricity usage beginning January 1, 1986 as authorized by

§ 839b(f)(2). Plan Vol. 1 at 1-3, 11, Vol. 2 Appendix J at Preface 4.

Petitioners argue that it is unreasonable for the Council to interpret cost effectiveness based upon a forecast which the Council itself concedes is "very unlikely." Petitioners argue that the Council cannot adopt a cutoff for cost effectiveness unless it is "more likely than not" that the predictions upon which it is based will be realized. See Industrial Union Department v. American Petroleum Inst., 448 U.S. 607, 653, 100 S.Ct. 2844, 2869, 65 L.Ed.2d 1010 (1980) (OSHA must show that it is more likely than not that health hazard would exist but for its regulations); Bunker Hill Co. v. EPA, 572 F.2d 1286, 1301 (9th Cir. 1977) (EPA cannot establish standards which demand technology which is experimental or only theoretically feasible).



Plan Vol. 1 at 5-17 (and figures 5-13, 5-14).

The 1983 plan predicts that the last resource to be acquired under the high-growth forecast will be a coal generating plant capable of producing electricity at a cost of slightly over four cents per kilowatt hour (4¢/kwh). The plan considers that conservation measures which "could displace this coal plant would be considered cost-effective." Plan Vol. 1 at 7-1. It defines as cost effective, therefore, any conservation measure with a marginal cost less than 4¢/kwh in current dollars. Id.

The Council concluded that its conservation standards are both cost effective for the region and economically feasible for consumers under § 839b(f)(1) and recommended that BPA impose a surcharge for nonconforming electricity usage beginning January 1, 1986 as authorized by

forecast or the 4¢/kwh cutoff to be unreasonable in light of the inherent indefiniteness of long-term energy forecasting.

The Act requires the plan to define cost effectiveness in terms of "incremental system cost," which the Council has interpreted to be an estimate of all direct and environmental costs of all the measures required by the conservation standards as a whole. See § 839a(4)(B). Consequently, the Council's measure of cost effectiveness is based on the average cost of a package of conservation measures, none of which has a marginal cost exceeding 4¢/kwh. Although it selected 4¢/kwh as the outer limit for cost effective conservation components, the Council estimates that the average system cost of its conservation standards is only 1.8¢/kwh, Plan Vol. 1 at 10-4, considerably less than the cost of other energy

resources. See Plan Vol. 1 at 4-3, 4-6 (figure 4-4, table 4-3).

Petitioners allege that this interpretation of cost effectiveness is contrary to the Act. They contend that the plan must examine the cost effectiveness of each individual conservation measure because the Act uses the singular in referring to cost effectiveness of "any measure or resource." § 839a(4)(A). The Council's approach is correct. The Act does not require that each individual component of the model conservation standards be cost effective. The purpose of the conservation standards is to require the Council to examine cost effectiveness of standards which, when adopted in their entirety, result in cost effective energy savings. All that is required is that the model conservation standards be cost effective, when viewed as a whole. See § 839b(f)(1).

Petitioners also allege that the Council's definition of cost effectiveness is unreasonable because the 1983 plan does [1369] not adequately consider potential conservation in the government, commercial and industrial sectors. The plan does include operational conservation programs applicable to government, Plan Vol. 1 at 10-17, 10-18, commerce, Plan Vol. 1 at 10-14, 10-15, and industry, Plan Vol. 1 at 10-15, 10-16, and sets conservation requirements for all sectors. Plan Vol. 1 at 7-7 - 7-12, 10-12 - 10-17; see Plan Vol. II Appendix J. The model energy conservation standards for new buildings apply equally to residential and nonresidential structures. See Plan Vol. II Appendix J. Whether the plan provides similar or dissimilar conservation standards for different sectors is a matter within Council discretion under the Act. See § 839a(4)(A), 839b(f)(1). We find the

Council's interpretation of the term "cost effective" to be reasonable.

In addition to requiring cost effectiveness for the region as a whole, the Act requires the model conservation standards to be economically feasible for consumers. § 839b(f)(1). The Act does not define the term but the plan contains a functional definition:

Although a house built to the Council's model standard will have a slightly higher initial cost, over the life of the house the consumer will be economically better off than if living in a house built to current codes.

Plan Vol. I at 7-3.

In measuring economic feasibility, the plan considers the cost and efficiency of the conservation standards as a whole. Petitioners argue that economic efficiency, like cost effectiveness, should properly be measured on a component-by-component basis. Petitioners assert that a particular conservation component is

economically feasible only if that particular component pays for itself: each individual component must save the homeowner more in electricity than it adds to the cost of the house. Instead of reflecting the marginal (or avoided) cost of energy resources, the petitioners insist, economic efficiency should be a function of the average market cost for electricity, which is not predicted to exceed 3.6¢/kwh. Plan Vol. 1 at 4-6 (table 4-3). Because the plan relies on marginal cost to measure economic efficiency, petitioners argue, the standards for economic feasibility are only theoretically feasible and therefore unreasonable. See Bunker Hill, 572 F.2d at 1301.

The Council believes that marginal cost is a more accurate measure of energy cost than is average cost because of differences in market price for different consumers. See Plan Vol. 1 at 4-6.



Furthermore, economic efficiency should be based upon avoided cost which is measured by marginal, not average, cost. See 126 Cong.Rec. 30181 (1980) (report of the Office of Technology Assessment). Cf. H.R.Rep. No. 96-976 (Part I), 96th Cong., 2d Sess. 50 (1980), U.S. Code Cong. & Admin.News 1980 p. 5989 ("cost comparison is done on the basis of incremental, or marginal, costs").

The plan's definition is consistent with congressional intent. See S.Rep. No. 96-272, 96th Cong., 1st Sess. 25 (1979) (the cost to consumers must be such that "the cost of complying with the standards . . . should not exceed, for the individual or entity to which the standards apply, the direct financial savings produced by compliance"). Petitioners have not shown the Council's definition of economic feasibility to be unreasonable.

Finally, the conservation standards cannot be economically feasible for owners of rental housing, petitioners argue, because the market will not support additional rents necessary to compensate for an increase in construction costs. Not only have petitioners not presented any support for their assertion, but the Council notes that homes which meet the conservation standards may command higher rents because of the savings tenants can enjoy in energy costs. Petitioners have not provided us with sufficient evidence upon which to disturb the Council's conclusion that the standards are economically feasible for owners of rental housing. Application of the model standards to rental housing is not arbitrary or capricious. [1370]

C. Methodology for determining  
conservation value

Petitioners challenge the technical, analytic process by which the Council arrived at its model conservation standards. The dispute centers on whether it was acceptable for the Council to arrive at its standards using industry engineering standards and computer simulations of energy usage, conservation and efficiency of various conservation measures.

Petitioners argue that the Council's failure to conduct component field testing to determine the value of various conservation measures was an abuse of discretion, and that such component testing is statutorily mandated. See, e.g. §§ 839a(4)(A), 839b(f)(1). They assert that component testing was feasible, would have yielded valuable data and could have been done in the two-year period the Act allows for preparation of the 1983 plan. See § 839b(d).

The Act does not, however, mandate any particular method of forecasting under either the definition of cost effectiveness, § 839a(4)(A), or the section requiring the preparation of model conservation standards, § 839b(f)(1). The Council is given the discretion under the statute to develop a forecast which provides model conservation standards that are cost effective, economically efficient and reflect regional geographic and climatic differences. § 839b(f)(1). See S.Rep. No. 96-272, 96th Cong., 1st Sess. 2 (1979) (value of conservation is to be determined "on the basis of a methodology developed by the Council as part of the plan"). As we have concluded above, the Council's use of four, 24-year forecasts was reasonable in light of its statutory mandate.

To test the value of particular conservation measures, the Council used a computer simulation model, Plan Vol. 1 at

10-4, Glossary-3, combined with standardized coefficients for building materials, components and assemblies. See generally Plan Vol. II Appendix K. The choice of methodology is a highly technical question which falls within the unique expertise of the Council. Unless an abuse of discretion is demonstrated, this court will not substitute its judgment on particular testing methodology. See Department of Water & Power v. BPA, 759 F.2d at 691 (and cases cited therein). While petitioners may be correct in asserting that the Council could have done component testing in lieu of simulations, the Act does not require the Council to do so. The methodology used in the 1983 plan employed accepted industry standards and principles of analysis. See American Society of Heating, Refrigerating and Air Conditioning Engineers, Inc., Ashrae Handbook 1981 Fundamentals (1981). We express no

1

opinion on the methodology and definitions proposed by the petitioners. Petitioners have not presented evidence before this court to raise serious doubt about the accuracy or reliability of the Council's computer simulation program or the Handbook of Fundamentals, upon which the Council relied. We conclude that the Council did not abuse its discretion when it chose to rely upon industry standards and computer simulations in its calculations of the value of various conservation components.

In our evaluation of the validity of the Council's technical methodology and of the conservation standards, two factors are crucial. First is the technical nature of the Council's decisions which even Congress recognized should be the result of technical, scientific choices. See §§ 839b(c)(11)-(13), 839b(g). Second is the deferential standard for our review



of the Council's action which we have already recognized above. The Council's interpretations of the Act are reasonable and its model conservation standards are not arbitrary or capricious. See Chevron, U.S.A., 104 S. Ct. at 2782-83 (and cases cited therein); see generally 5 K.C. Davis, Administrative Law Treatise § 29.20 (2d ed. 1984).

#### IV. Application of State Environmental Laws

Petitioners claim that the 1983 plan violates state environmental protection laws [1371] because the Council did not prepare an environmental impact assessment on the model conservation standards. See Wash.Rev.Code Ann. §§ 43.21C.010, 43.21C.030 (Washington environmental protection statute); Mont.Code Ann. §§ 75-1-101, 75-1-201 (Montana Environmental Policy Act).

To the extent that the Council functions as a compact, it is considered

the state-created agency of each state. Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1358 (9th Cir. 1977), Aff'd, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979). A state can impose state law on a compact organization only if the compact specifically reserves its right to do so. See People v. City of South Lake Tahoe, 466 F.Supp. 527, 537 (E.D.Cal. 1978) (compact specifically reserved the right to impose regulations which were more stringent than those imposed by the compact organization itself). Neither Washington nor Montana reserved such rights in their statutes agreeing to establishment of the Council. See Wash.Rev.Code § 43.52A.010; Mont.Code Ann § 90-4-401.

We need not decide whether or to what extent federal environmental laws, e.g. 42 U.S.C. § 4321 et seq., would apply. Neither BPA nor the Council has

taken a substantial federal action affecting the human environment which might trigger application of federal environmental laws. See 42 U.S.C. § 4332-(C)(ii).

PETITION DENIED.

BEEZER, Circuit Judge, dissenting:

This case raises a novel issue under the Appointments Clause of the United States Constitution. We must consider whether Congress may delegate certain federal authority to a body, acting through state-appointed officers, or whether such responsibilities must be reserved to a properly constituted federal agency acting through constitutionally appointed executive officials.

At issue is the constitutionality of the method of selecting the members of the Pacific Northwest Electric Power and Conservation Planning Council. Because I conclude that the method of selecting the

members of the Council violates the Appointments Clause, I respectfully dissent.

## I

Background

In 1937, Congress created the Bonneville Power Administration ("BPA"), a federal agency charged with the production, marketing, and distribution of electric power in the Pacific Northwest. In 1980, Congress created the Pacific Northwest Electric Power and Conservation Planning Council ("Council"), which is responsible for promulgating a regional conservation and electric power plan. Pacific Northwest Electric Power Planning and Conservation Act ("the Planning Act"), 16 U.S.C. §§ 839-839h. The Council is composed of members appointed by the governors of Idaho, Montana, Oregon, and Washington. Id. §839b(a)(2)(B). Each state has passed implementing legislation.

Idaho Code §§ 61-1201 to -1207; Mont.Code Ann. §§ 90-4-401 to -404; Or.Rev.Stat. § 469.800-.845; Wash.Rev.Code §§ 43.52A.010-.050.

The Council adopted a plan on June 1, 1983. 48 Fed.Reg. 24,493 (1983). Pursuant to 16 U.S.C. § 839f(e)(1)(A), the Seattle Master Builders Association and several other business organizations filed a petition for review in this court. The United States of America intervened on behalf of the Council.

## II

### The Applicability of the Appointments Clause

The petitioners argue that the members of the Council must be selected in accordance with the Appointments Clause, which states:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme

Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established [1372] by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, cl. 2 (emphasis added). The Council argues that the Appointments Clause is inapplicable because the Council is an interstate compact agency. As a result, two threshold issues must be addressed: (1) whether the Council is an interstate compact agency, and (2) whether the Appointments Clause applies to the members of interstate compact agencies.

A. The Existence of an Interstate Compact

Over half a century ago, Felix Frankfurter and James Landis argued that interstate compacts could provide an effective means for allowing coordinated federal-state control of electric power.



Frankfurter & Landis, The Compact Clause of the Constitution -- A Study in Interstate Adjustments, 34 Yale L.J. 685, 717 (1925). The Council, joined by the four Pacific Northwest states and the National Governors' Association as amici curiae, argues that the Planning Act created an interstate compact. The petitioners, joined by the Pacific Legal Foundation as amicus curiae, argue that the Council is a federal agency.

In form, the creation of the Council resembles the creation of an interstate compact. After listing the purposes of the Council, the Planning Act states: "To achieve such purposes and facilitate cooperation among the States of Idaho, Montana, Oregon, and Washington, and with the Bonneville Power Administration, the consent of Congress is given for an agreement described in this paragraph and not in conflict with this chapter. . . ."

16 U.S.C. § 839b(a)(2). The Planning Act also states that the appointment of members by three states "shall constitute an agreement by the States establishing the Council and such agreement is hereby consented to by the Congress." Id.

On the other hand, the Council lacks several of the classic indicia of an interstate compact. For example, the Supreme Court recently noted that two reciprocal state statutes were unlike an interstate compact because "[n]either statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally." Northeast Bancorp, Inc. v. Board of Govrnors, \_\_ U.S. \_\_\_, 105 S.Ct. 2545, 2554, 86 L.Ed.2d 112 (1985). None of the Pacific Northwest states conditioned their agreement to participate in the Council on action by the other states. All four

states are free to repeal their statutes unilaterally.

More significantly, the Planning Act authorized the creation of the Council on the consent of only three of the four states. 16 U.S.C. § 839b(a)(2). The Planning Act does not, however, limit the geographical scope of the Council's responsibilities in such a case. Suppose, for example, that Idaho, Montana, and Oregon had joined the Council, but that Washington had declined to join. The Council, composed of members from Idaho, Montana, and Oregon, would have been responsible for preparing a plan for all four states. In that case, the Council would have taken action that could have substantive effects in a nonmember state.<sup>1</sup> If the Council is truly an

---

<sup>1</sup> The substantive effects of Council action are discussed below.

interstate compact agency, that result would not be possible.

In fact, the "region" serviced by the BPA includes portions of Nevada, Utah, Wyoming, and California. 16 U.S.C. §§ 839a(14)(A) & (B). To the extent the Council has authority over BPA actions, the Council also exercises authority affecting electric utility consumers living outside the four states from which the Council members were appointed. The four states involved have therefore agreed to participate in establishing policy and standards, not for each other, but for a federal agency with regional authority extending beyond those states. This is strong evidence that Congress did not intend the establishment of an interstate compact. [1373]

Finally, the Council lacks the most important indicia of an interstate compact agency: a state purpose. While it is

apparent that the Pacific Northwest states have a strong interest in obtaining representation in regional policy making by the BPA, the purpose of the Council is not representative in nature. Instead, the purpose of the Council is to guide the actins of the BPA. Because the states have no right to exercise control over the BPA, that is not a state purpose. If the Council was responsible for coordinating energy and conservation planning at the state level, it would have a state purpose. See Frankfurter & Landis, supra, at 717 (proposing "[c]oordinated [electric power] regulation among groups of States, in harmony with Federal administration over developments on navigable streams and in the public domain"). The Council has no such responsibility.

It is true that interstate compacts by their very nature have federal law implications and provide a vehicle for

states to act in a manner in which a state may not act without congressional consent, thus altering a state's sphere of authority. See L. Tribe, American Constitutional Law § 6-31, at 402 (1978). Congressional consent does "transform an interstate compact . . . into a law of the United States," Cuyler v. Adams, 449 U.S. 433, 438, 101 S.Ct. 703, 707, 66 L.Ed.2d 641 (1981), in that federal judicial interpretation of a compact under the Supremacy Clause controls over a state's application of its own law. See West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 33, 71 S.Ct. 557, 563, 95 L.Ed.2d 713 (1951) (Reed, J., concurring). However, granting a body of state-appointed officials the power to constrain the actions of a federal executive agency is quite another thing. That is not a legitimate function of an interstate compact agency.



While it is difficult to characterize the Council as an interstate compact agency, it is easy to characterize the Council as a federal agency. The classic definition of an "agency" is a "a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rule-making." 1 K. Davis, Administrative Law Treatise § 1.01, at 1 (1st ed. 1958); see id. § 1.02 (2d ed. 1978). The Council is a "governmental authority," and its plan constitutes "rulemaking." See 16 U.S.C. § 839b(a)(4) (stating that the Council is subject to the same general administrative rules as the BPA and the Federal Energy Regulatory Commission). As this case demonstrates, the Council's plan "affects the rights of private parties." The Council is thus an agency. Because the Council has a federal purpose and receives

its authority from federal law, the Council is a federal agency.

In sum, the Council is not an ordinary interstate compact agency. At best, the Council can be characterized as a federal agency created through the interstate compact process. At worst, the Council is a federal agency with its members appointed by state governors. Under either approach, the Council is not exempt from the requirements of the Appointments Clause.

B. The Applicability of the Appointments Clause to Interstate Compacts

The Council argues that interstate compacts are exempt from the Appointments Clause. Assuming for present purposes that the Council can be treated as an interstate compact agency, this argument raises a single issue: whether persons who would ordinarily be regarded as "Officers of the United States" for purposes of the Appointment Clause need

not be appointed in accordance with that provision when their authority is based on an interstate compact. A careful review of the relevant constitutional provisions reveals that the members of interstate compact agencies are not exempt from the Appointments Clause.

Initially, it should be noted that the Appointments Clause is a grant of power to the executive branch. The President has the power to nominate federal officers and, with the advice and consent of the Senate, [1374] to appoint them.<sup>2</sup> See Buckley v. Valeo, 424 U.S. 1, 131, 96 S.Ct. 612, 688, 46 L.Ed.2d 659 (1976) (per curiam); L. Tribe, American

---

<sup>2</sup> Concurrent with and derived from this power of appointment, the Constitution "implicitly confers upon the President power to remove civil officers whom he appoints, at least those who exercise executive powers." Synar v. United States, 626 F.Supp. 1374, 1395 (D.D.C. 1986) (declaring automatic deficit reduction provisions of the Balanced Budget and Emergency Deficit Control Act of 1985 unconstitutional as vesting executive

Constitutional Law § 4-8 (1978). In the absence of specific constitutional authority, Congress may not usurp the President's power to nominate federal officers. See Buckley, 424 U.S. at 135, 96 S.Ct. at 689 (holding that the Necessary and Proper Clause, U.S. Const. art. II, § 8, cl. 18, does not authorize congressional abrogation of the Appointments Clause); L. Tribe, supra, § 4-8, at 184-85 (noting that the Appointments Clause "seeks to

---

power to prescribe federal budget reductions in the Comptroller General, an officer removable by Congress); see also Myers v. United States, 272 U.S. 52, 119, 47 S.Ct. 21, 26, 71 L.Ed. 160 (1926) (upholding as incident to power of appointment, the President's plenary power to dismiss a postmaster despite statutory requirement of advice and consent by the Senate).

As with the appointment power, the authority to remove officers exercising executive authority serves the constitutional principle of separation of powers by preserving the President's control over executive governmental functions. It is thus significant that the members of the Council not only are not subject to appointment by the President, but also are not made subject to removal by him.

preserve an executive check upon legislative authority").

Congressional authority would be enhanced at the expense of the executive if Congress had the unrestricted power to confer the appointment authority on third parties. To the extent that a governor can appoint a member of an interstate compact agency who would otherwise be subject to the Appointments Clause, the power of the executive branch is diminished.<sup>3</sup>

The Compacts Clause, on the other hand, is not a grant of power either

---

<sup>3</sup> Indeed, the Framers expressly rejected the idea that the Appointments Clause is not violated so long as Congress does not arrogate to itself the power to appoint or remove federal officers. The Constitutional Convention voted down a proposed amendment to the Appointments Clause that would have permitted the Congress to delegate appointment power to state governors. 2 M. Farrand, The Records of the Federal Convention of 1787, 406, 418-19 (rev. ed. 1966).

to the states or to Congress. On the contrary, it is a prohibition: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State. . . ." U.S. Const. art. I, § 10, cl. 3. The Compacts Clause does not give Congress the power to create interstate compacts. Similarly, the Compacts Clause does not expressly authorize states to enter into compacts. Instead, the Compacts Clause is a prohibition with an exception. Cf. U.S. Const. amend X ("The powers not . . . prohibited by [the Constitution] to the States are reserved to the States respectively . . . ."). Indeed, most of the cases that have analyzed the Compacts Clause have involved unauthorized interstate compacts. E.g., Northeast Bancorp, 105 S.Ct. at 2554-55.

In light of the language of the two clauses, it is apparent that the Compacts



Clause is not an exception to the Appointments Clause. The executive branch has the unqualified right to nominate all federal officers. Congress lacks the constitutional authority to delegate that power to the states. Moreover, the Supremacy Clause prevents the states from usurping the executive branch's power. U.S. Const. art VI, cl. 2. Accordingly, the Council's alleged status as an interstate compact agency does not exempt it from scrutiny under the Appointments Clause.

### III

#### The Constitutionality of the Council

It is next necessary to determine whether the method of selecting Council members is constitutional under the Appointments Clause. In light of the Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam), it is

apparent that the relevant provisions of the Planning Act are unconstitutional. [1375]

A. The Constitutional Status of Council Members

1. The Appropriate Legal Standard

The Council argues that the Appointments Clause applies only to employees of the federal government. In essence, the Council is arguing that the applicability of the Appointments Clause is determined by the status of the officer; rather than by the officer's power and authority. In Buckley, the Supreme Court specifically rejected that approach and instead emphasized substance over form:

The Appointments Clause could, of course, be read as merely dealing with etiquette or protocol in describing "Officers of the United States" but the drafters had a less frivolous purpose in mind . . . .

We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in United States v Germaine, [99 U.S. (9 Otto) 508, 25 L.Ed. 482 (1878)],

is a term intended to have substantial meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by § 2, cl. 2 of that Article.

424 U.S. at 125-126, 96 S.Ct. at 685.

Accordingly, the issue is whether Council members exercise "significant authority pursuant to the laws of the United States."<sup>4</sup>

2. Significant Authority Pursuant to Federal Law

The Council does not argue that it lacks significant authority pursuant to Federal law. Indeed, the United States

---

<sup>4</sup> The Council argues that the Buckley test is inapplicable because this case does not present a separation of powers issue. It is apparent, however, that this case raises a separation of powers issue to the extent that Congress and the states are usurping the President's power to nominate federal officers. This case also raises a separation of powers issue to the extent that a "state" entity is exercising authority over exclusively federal functions. In any event, the Council's argument lacks a basis in the text of the Appointments Clause.

government concedes that several provisions of the Planning Act may give the Council "significant" authority pursuant to federal law. An examination of the Planning Act reveals that the Council is not an advisory planning council. Instead, the Council's plan had substantive effects. By issuing the plan, the Council exercised significant authority under federal law.

Initially, the Planning Act requires the BPA to act in a manner consistent with the plan. Section 839b(d)(2) states: "Following adoption of the plan and any amendment thereto, all actions of the Administrator [of the BPA] pursuant to section 839d of this title ["Conservation and resource acquisition"] shall be consistent with the plan and any amendment thereto, except as otherwise specifically provided in this chapter." 16 U.S.C. § 839b(d)(2). The Administrator is em-

powered to determine whether a resource acquisition or conservation decision is consistent with the plan. Id. § 839d(a)(1), (b)(1). As a result, section 839b(d)(2) does not give the Council the power to control the BPA. The issue, however is not whether the Council can control the BPA, but whether the Council exercises significant authority pursuant to federal law. The ability to issue a plan with which the BPA must act consistently constitutes significant authority pursuant to federal law.

The Council's authority, however, extends beyond the ability to promulgate the plan. Under section 839b(i), the Council is authorized to review the BPA's actions "to determine whether such actions are consistent with the plan . . . [and] the extent to which the plan . . . is being implemented." Id. § 839b(i). Under section 839b(j), the Council can

request the Administrator to take action. Id. § 839b(j)(1). The Administrator must respond in writing within ninety days. Id. § 839b(j)(2). If the Administrator refuses to take the requested action, the Council can request an informal hearing and a final, reviewable decision. Id. § 839b(j)(3). While it is true that the Council cannot force the BPA to take action consistent with the plan, this mechanism allows the Council to exert pressure on the [1376] BPA. It also allows the Council to obtain judicial review of the BPA's inaction.

In addition, the Council has the power to block major resource acquisitions or conservation measures that are inconsistent with the plan. Within sixty days after the Administrator's decision, the Council may determine by a majority vote that the proposed acquisition or measure is inconsistent with the plan. Id. §



839d(c)(2)(A); see also id. § 839d(c)(2) (B) (stating that the Council may declare a proposed major acquisition or measure inconsistent with the criteria for developing a plan if no plan is in effect). Section 839d(c)(3) states:

The Administrator may not implement any [major resource acquisition or conservation measure] that is determined . . . by . . . the Council to be inconsistent with the plan . . .

(A) unless the Administrator finds that, notwithstanding such inconsistency, such resource is needed to meet the Administrator's obligations under this chapter, and

(B) until the expenditure of funds for that purpose has been specifically authorized by Act of Congress enacted after December 5, 1980.

Id. § 839d(c)(3) (emphasis added). Under that provision, the Council has authority to block a major resource acquisition or conservation measure unless the BPA can persuade Congress to overrule the Council.

Section 839c(d) gives the Council similar authority. The Planning Act

establishes a limitation on the amount of electric power that the BPA can sell to direct service industrial customers. Id. § 839c(d)(1). If the BPA seeks to exceed that limitation, Council approval is required. Id. § 839c(d)(3).

Finally, the Planning Act allows the Council to recommend the imposition of a surcharge on the electric rates of customers in areas that have not enacted adequate conservation programs. Id. § 839b(f)(2). In the absence of such a recommendation, the BPA lacks authority to impose such a surcharge.

In sum, the Planning Act gives the Council the ability to produce significant substantive effects. As a result, the members of the Council are "Officers of the United States." Because the President did not appoint the members of the Council, the Council's actions are contrary to the Constitution and therefore void.

### 3. Other State Officials

The Council argues that invalidation of the Council under the Appointments Clause would mean that various other state officials must be appointed by the President. This argument overlooks the peculiar nature of the Council. On examination, each of the classes of state officials suggested by the Council lacks the characteristics that make the Council subject to the Appointments Clause.

The first class is composed of state officials who spend federal funds. The Council's brief states that "the provision of conditional federal grants for elementary education, for example, does not bring the appointment of school boards and principals under the supervision of the President; yet these state officials establish plans that govern the manner in which federal money may be spent." While the Council is correct, this class of

officials can be distinguished from the Council in three ways. First, these officials do not exercise significant authority under federal law. They do not decide whether funds will be granted or the size of the grant. Second, these officials do not exercise control over the actions of federal officials. Third, these state officials have no authority at all until the funds are received by the state. At that point, the funds are, in effect, state funds.

The second class is composed of state judges. As the Council notes, state judges can decide federal issues. A state judge's authority, however, derives solely from state law. If a state chooses to create courts of general jurisdiction, those courts cannot refuse to decide federal issues. See C. Wright, The Law of Federal Courts § 45 (4th ed. 1983). The Supremacy Clause [1377] requires state

judges to obey federal law, but does not allow those judges to change or to create federal law.

The third class is composed of state legislators. To the extent that state statutes do not discriminate against federal entities or interfere with federal activities [sic], federal agencies are subject to those statutes. See Hancock v. Train, 426 U.S. 167, 179-80, 96 S.Ct. 2006, 2012-13, 48 L.Ed.2d 555 (1976); United States v. Texas, 695 F.2d 136, 138 n. 6 (5th Cir.), cert. denied, 464 U.S. 933, 104 S.Ct. 336, 78 L.Ed.2d 305 (1983). In some cases, Congress specifies that federal entities must obey state laws that would otherwise be preempted. See California v. United States, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978). In those cases, Congress has merely narrowed the scope of federal preemption. The state legislatures are not authorized to

pass legislation solely for the purpose of regulating federal agencies.

The final class is composed of the members of ordinary interstate compact agencies. A compact operates as federal law in the sense that construction of the compact's terms presents a federal question and that state law is not a defense to noncompliance with the compact's terms. See L. Tribe, supra, § 6-31, at 402. The Council, however, is not an ordinary compact. The Council was not created for a state purpose. If, for example, the Council had the power to coordinate energy planning at the state level, it would be valid to that extent. Likewise, Congress perhaps could delegate authority over regional energy production and distribution to an interstate compact agreed to by the states in that region, but Congress may not retain that authority in a federal executive agency (BPA) and create or

approve a state-appointed body (the Council) that may subject that executive agency, at least in part, to its control. Unlike ordinary compacts, the Council can produce substantive effects under federal law. Because the Council's actions are at least partially binding on the BPA, the members of the Council must be appointed in accordance with the Appointments Clause.

B. Innovative Cooperative Federalism

The Council, along with the four Pacific Northwest states and the National Governors' Association as amici curiae, argues that the Planning Act represents an innovative program of cooperative federalism. Noting that the Appointments Clause was intended to prevent the accumulation of power in one branch of government, the Council asserts that "the innovative form of federalism at issue in this case better serves the concern of the Framers than



would a federally appointed council or a complete delegation of both planning and execution functions to the Administrator." Regardless of the accuracy of that assertion, the Council's position lacks a basis in the text of the Constitution. The members of the Council exercise significant authority pursuant to federal law. As a result, the system of federalism embodied in the Constitution gives the power to select Council members to the executive branch.

In essence, the Council is arguing that the allocation of powers and duties in the Constitution should be relaxed in this case for policy reasons. Similar arguments have frequently been rejected. During the Great Depression, for example, the government argued that the existence of a domestic emergency justified legislation that would otherwise be unconstitutional. See Belknap, The New Deal and

the Emergency Powers Doctrine, 62 Texas L.Rev. 67 (1983). The Supreme Court rejected that argument:

Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.

A.L.A. Schechter Poultry Corp v. United States, 295 U.S. 495, 528-29, 55 S.Ct. 837, [1378] 842-43, 79 L.Ed. 1570 (1935); see Belknap, supra, at 92-98.

More recently, the Supreme Court considered the validity of the legislative veto. Rejecting numerous policy arguments, the Court held that the legislative veto is unconstitutional. INS v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). In a dissenting opinion, Justice White focused on the functional utility of the legislative veto. Id. at

967, 103 S.Ct. at 2792 (White, J., dissenting). The majority rejected that approach:

The choices we discern as having been made in the Constitutional Convention impose burdens on government processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental act to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Id. at 959, 103 S.Ct. at 2788 (citation omitted).

It is true that the legislative veto and the emergency powers doctrine involved constitutional issues different

from those at issue in this case. Nevertheless, those cases illustrate the importance of maintaining the basic structure set forth in the Constitution. See United States v. Woodley, 751 F.2d 1008, 1014 (9th Cir. 1985) (en banc) ("Changes in [the Constitution] must come through constitutional amendment, not through judicial reform based on policy arguments."). The Council cannot be upheld as an innovative form of cooperative federalism.

#### IV

##### Conclusion

Congress anticipated the possibility that the provisions for formation of the Council might be found unconstitutional. See 16 U.S.C. § 839h (specifically stating that the provisions creating the Council are separable). In fact, Congress provided for the alternative establishment of the Council as a federal agency if the

courts invalidated the creation of the Council as a compact. Id. § 839b(b)(1) (A). Under the alternative scheme, the governors of the four Pacific Northwest states may nominate the Council members subject to the approval of the Secretary of Energy. Id. § 839b(2). Similar schemes have been upheld. See United States v. Hartwell, 73 U.S. (6 Wall.) 385, 18 L.Ed. 830 (1867); Woodford v. United States, 77 F.2d 861, 863-64 (8th Cir. 1935). In this case, however, Congress has usurped the constitutionally delegated power of the executive branch by authorizing state governors to appoint the members of the Council. I would grant the petition for review and vacate the plan.

86-629  
No. 2

Supreme Court, U.S.  
FILED

OCT 6 1986

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
Supreme Court of the United States

October Term, 1986

SEATTLE MASTER BUILDERS ASSOCIATION, et al.,  
*Petitioners,*

v.

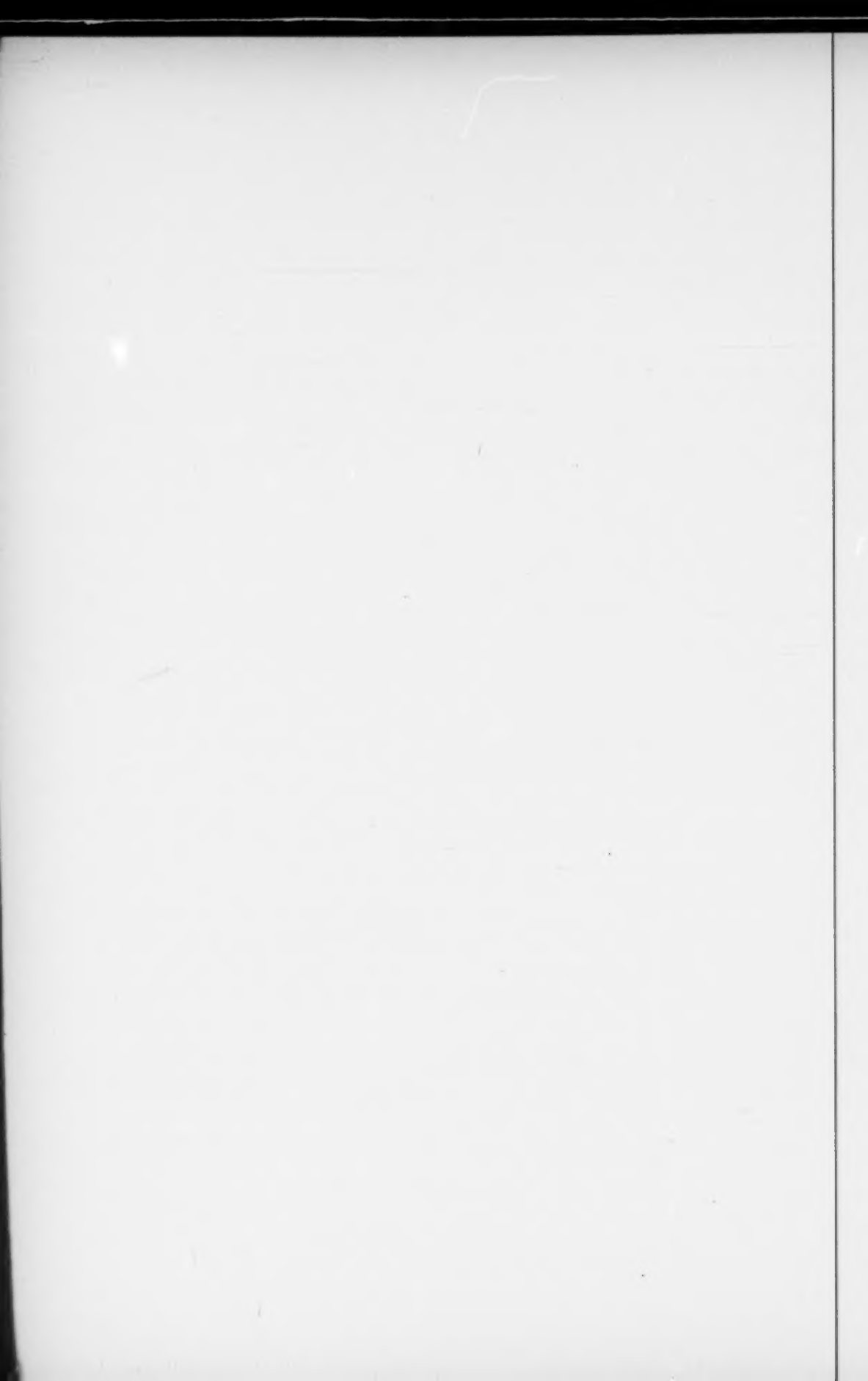
PACIFIC NORTHWEST ELECTRIC POWER  
AND CONSERVATION PLANNING COUNCIL,  
*Respondent,*

UNITED STATES OF AMERICA,  
*Intervenor-Respondent.*

APPENDICES B THROUGH M (VOL. 1 OF 2) TO  
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOHN W. HEMPELMANN  
*Counsel of Record, and*

PAUL SIKORA  
MICHAEL B. KING  
DIAMOND & SYLVESTER  
2600 Columbia Center  
701 Fifth Avenue  
Seattle, Washington 98104-7088  
(206) 623-1330  
*Attorneys for Petitioner*



or remove federal officers. The Constitutional Convention voted down a proposed amendment to the Appointments Clause that would have permitted the Congress to delegate appointment power to state governors. 2 M. Farrand, The Records of the Federal Convention of 1787, 406, 418-19 (rev. ed. 1966).

Second, renumber footnote 3 on page 10, line 16, as footnote 4.



APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NO. 83-7585

SEATTLE MASTER BUILDERS ASSOCIATION;  
HOMEBUILDERS ASSOCIATION OF SPOKANE,  
INC.; NATIONAL WOODWORK MANUFACTURERS'  
ASSOCIATION; FIR & HEMLOCK DOOR  
ASSOCIATION; SHELTER DEVELOPMENT  
CORPORATION; CLAIR W. DAINES, INC.;  
CONNER DEVELOPMENT CO., INC.;  
HOMEBUILDERS ASSOCIATION OF WASHINGTON  
STATE,

Petitioners,

vs.

PACIFIC NORTHWEST ELECTRIC POWER AND  
CONSERVATION PLANNING COUNCIL  
(NORTHWEST POWER PLANNING COUNCIL),

Respondent,

and

UNITED STATES OF AMERICA,  
Intervenor-Respondent.

ORDER

Judge Beezer's dissent is amended as  
follows:

First, add a new footnote 3 at page  
8, line 14, after "is diminished.", to  
read as follows:

3/Indeed, the Framers expressly  
rejected the idea that the Appoint-  
ments Clause is not violated so  
long as Congress does not arrogate  
to itself the power to appoint or

APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

NO. 83-7585

SEATTLE MASTER BUILDERS ASSOCIATION;  
HOMEBUILDERS ASSOCIATION OF SPOKANE,  
INC.; NATIONAL WOODWORK MANUFACTURERS'  
ASSOCIATION; FIR & HEMLOCK DOOR  
ASSOCIATION; SHELTER DEVELOPMENT  
CORPORATION; CLAIR W. DAINES, INC.;  
CONNER DEVELOPMENT CO., INC.;  
HOMEBUILDERS ASSOCIATION OF WASHINGTON  
STATE,

Petitioners,

vs.

PACIFIC NORTHWEST ELECTRIC POWER AND  
CONSERVATION PLANNING COUNCIL  
(NORTHWEST POWER PLANNING COUNCIL),

Respondent,

and

UNITED STATES OF AMERICA,  
Intervenor-Respondent.

ORDER

Judge Beezer's dissent is amended as  
follows:

First, add a new footnote 3 at page  
8, line 14, after "is diminished.", to  
read as follows:

3/Indeed, the Framers expressly  
rejected the idea that the Appoint-  
ments Clause is not violated so  
long as Congress does not arrogate  
to itself the power to appoint or

or remove federal officers. The Constitutional Convention voted down a proposed amendment to the Appointments Clause that would have permitted the Congress to delegate appointment power to state governors. 2 M. Farrand, The Records of the Federal Convention of 1787, 406, 418-19 (rev. ed. 1966).

Second, renumber footnote 3 on page 10, line 16, as footnote 4.

## APPENDIX C

### United States Constitution, Article I, Section 10, Clause iii ("Compacts Clause"):

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.



## APPENDIX D

United States Constitution, Article II,  
Section 2, Clause ii ("Apportionments  
Clause"):

[The President] shall . . . nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for and which shall be established by the Law: but the Congress may by Law vest Appointment of such inferior Officers as they think proper, in the President alone, in the Court of Law, or in the Heads of Department.





APPENDIX E

16 U.S.C. CHAPTER 12H - PACIFIC NORTHWEST  
ELECTRIC POWER PLANNING AND CONSERVATION  
("The Act")

. . . .

§ 839. Congressional declaration of  
purpose

The purposes of this chapter, together with the provisions of other laws applicable to the Federal Columbia River Power System, are all intended to be construed in a consistent manner. Such purposes are also intended to be construed in a manner consistent with applicable environmental laws. Such purposes are:

. . . .

(3) to provide for the participation and consultation of the Pacific Northwest States, local governments, consumers, customers, users of the Columbia River System (including Federal and State fish and wildlife agencies and appropriate Indian tribes), and the public at large within the region in -

(A) the development of regional plans and programs related to energy conservation, renewable resources, other resources, and protecting, mitigating, and enhancing fish and wildlife resources,

(B) facilitating the orderly planning of the region's power system, and

(C) providing environmental quality;

§ 839a. Definitions

As used in this chapter, the term -

. . . .

(4)(A) "Cost-effective", when applied to any measure or resource referred to in this chapter, means that such measure or resource must be forecast -

(i) to be reliable and available within the time it is needed, and

(ii) to meet or reduce the electric power demand, as determined by the Council or the Administrator, as appropriate, of the consumers of the customers at an estimated incremental system cost no greater than that of the least-cost similarly reliable and available alternative measure or resource, or any combination thereof.

(B) For purposes of this paragraph, the term "system cost" means an estimate of all direct costs of a measure or resource over its effective life, including, if applicable, the cost of distribution and transmission to the consumer and, among other factors, waste disposal costs, end-of-cycle costs, and fuel costs (including projected increases), and such quantifiable environmental costs and benefits as the Administrator determines, on the basis of a methodology developed by the Council as part of the plan, or in the absence of the plan by

the Administrator, are directly attributable to such measure or resource.

(C) In determining the amount of power that a conservation measure or other resource may be expected to save or to produce, the Council or the Administrator, as the case may be, shall take into account projected realization factors and plant factors, including appropriate historical experience with similar measures or resources.

(D) For purposes of this paragraph, the "estimated incremental system cost" of any conservation measure or resource shall not be treated as greater than that of any nonconservation measure or resource unless the incremental system cost of such conservation measure or resource is in excess of 110 per centum of the incremental system cost of the nonconservation measure or resource.

. . . . .

(12) "Major resource" means any resource that -

(A) has a planned capability greater than fifty average megawatts, and

(B) if acquired by the Administrator, is acquired for a period of more than five years.

Such term does not include any resource acquired pursuant to section 838i(b)(6) of this title.

. . . . .

(19) "Resource" means -

(A) electric power, including the actual or planned electric power capability of generating facilities, or

(B) actual or planned load reduction resulting from direct application of a renewable energy resource by a consumer, or from a conservation measure.

§ 839b. Regional planning and participation

(a) Pacific Northwest Electric Power and Conservation Planning Council; establishment and operation as regional agency

(1) The purposes of this section are to provide for the prompt establishment and effective operation of the Pacific Northwest Electric Power and Conservation Planning Council, to further the purposes of this chapter by the Council promptly preparing and adopting (A) a regional conservation and electric power plan and (B) a program to protect, mitigate, and enhance fish and wildlife, and to otherwise expeditiously and effectively carry out the Council's responsibilities and functions under this chapter.

(2) To achieve such purposes and facilitate cooperation among the States of Idaho, Montana, Oregon, and Washington, and with the Bonneville Power Administration, the consent of Congress is given for an agreement described in this paragraph and not in conflict with this chapter, pursuant to which -

(A) there shall be established a regional agency known as the "Pacific Northwest Electric Power and Conservation Planning Council" which (i) shall have its offices in the Pacific Northwest, (ii) shall carry out its functions and responsibilities in accordance with the provisions of this chapter, (iii) shall continue in force and effect in accordance with the provisions of this chapter, and (iv) except as otherwise provided in this chapter, shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law; and

(B) two persons from each State may be appointed, subject to the applicable laws of each such State, to undertake the functions and duties of members of the Council

The State may fill any vacancy occurring prior to the expiration of the term of any member. The appointment of six

initial members, subject to applicable State law, by June 30, 1981, by at least three of such States shall constitute an agreement by the States establishing the Council and such agreement is hereby consented to by the Congress. Upon request of the Governors of two of the States, the Secretary shall extend the June 30, 1981, date for six additional months to provide more time for the States to make such appointments.

. . . . .

(d) Regional conservation and electric power plan

(1) Within two years after the Council is established and the members are appointed pursuant to subsection (a) or (b) of this section, the Council shall prepare, adopt, and promptly transmit to the Administrator a regional conservation and electric power plan. The adopted plan, or any portion thereof, may be amended from time to time, and shall be

reveiwed by the Council not less frequently than once every five years. Prior to such adoption, public hearings shall be held in each Council member's State on the plan or substantial, nontechnical amendments to the plan proposed by the Council for adoption. A public hearing shall also be held in any other State of the region on the plan or amendments thereto, if the Council determines that the plan or amendments would likely have a substantial impact on that State in terms of major resources which may be developed in that State and which the Administrator may seek to acquire. Action of the Council under this subsection concerning such hearings shall be subject to section 553 of Title 5 and such procedure as the Council shall adopt.

(2) Following adoption of the plan and any amendment thereto, all actions of the Administrator pursuant to section 839d



of this title shall be consistent with the plan and any amendment thereto, except as otherwise specifically provided in this chapter.

. . . .

(f) Model conservation standards;  
surcharges

(1) Model conservation standards to be included in the plan shall include, but not be limited to, standards applicable to (A) new and existing structures, (B) utility, customer, and governmental conservation programs, and (C) other consumer actions for achieving conservation. Model conservation standards shall reflect geographic and climatic differences within the region and other appropriate considerations, and shall be designed to produce all power savings that are cost-effective for the region and economically feasible for consumers, taking into account financial assistance made available to consumers under section

839d(a) of this title. These model conservation standards shall be adopted by the Council and included in the plan after consultation, in such manner as the Council deems appropriate, with the Administrator, States, and political subdivisions, customers of the Administrator, and the public.

(2) The Council by a majority vote of the members of the Council is authorized to recommend to the Administrator a surcharge and the Administrator may thereafter impose such a surcharge, in accordance with the methodology provided in the plan, on customers for those portions of their loads within the region that are within States or political subdivisions which have not, or on the Administrator's customers which have not, implemented conservation measures that achieve energy savings which the Administrator determines are comparable to those

which would be obtained under such standards. Such surcharges shall be established to recover such additional costs as the Administrator determines will be incurred because such projected energy savings attributable to such conservation measures have not been achieved, but in no case may such surcharges be less than 10 per centum or more than 50 per centum of the Administrator's applicable rates for such load or portion thereof.

. . . .

§ 839d. Conservation and resource acquisition

(a) Conservation measures; resources

(1) The Administrator shall acquire such resources through conservation, implement all such conservation measures, and acquire such renewable resources which are installed by a residential or small commercial consumer to reduce load, as the Administrator determines are consistent with the plan, or if no plan is in effect

with the criteria of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title and, in the case of major resources, in accordance with subsection (c) of this section. Such conservation measures and such resources may include, but are not limited to -

(A) loans and grants to consumers for insulation or weatherization, increased system efficiency, and waste energy recovery by direct application,

(B) technical and financial assistance to, and other cooperation with, the Administrator's customers and governmental authorities to encourage maximum cost-effective voluntary conservation and the attainment of any cost-effective conservation objectives adopted by individual States or subdivisions thereof,

(C) aiding the administrator's customers and governmental authorities in implementing model conservation standards adopted pursuant to section 839b(f) of this title, and

(D) conducting demonstration projects to determine the cost effectiveness of conservation measures and direct application of renewable energy resources.

(2) In addition to acquiring electric power pursuant to section 839c(c) of this title, or on a short-term basis pursuant to section 11(b)(6)(i) of the Federal

Columbia River Transmission System Act [16 U.S.C.A. § 838i(b)(6)(i)], the Administrator shall acquire, in accordance with this section, sufficient resources -

(A) to meet his contractual obligations that remain after taking into account planned savings from measures provided for in paragraph (1) of this subsection, and

(B) to assist in meeting the requirements of section 839b(h) of this title.

The Administrator shall acquire such resources without considering restrictions which may apply pursuant to section 839c(b) of this title.

(b) Acquisition of resources

(1) Except as specifically provided in this section, acquisition of resources under this chapter shall be consistent with the plan, as determined by the Administrator.

(2) The Administrator may acquire resources (other than major resources) under this chapter which are not consistent with the plan, but which are determined by the Administrator to be consis-

tent with the criteria of section 839b(e) (1) of this title and the considerations of section 839b(e)(2) of this title.

. . . .

(5) Notwithstanding any acquisition of resources pursuant to this section, the Administrator shall not reduce his efforts to achieve conservation and to acquire renewable resources installed by a residential or small commercial consumer to reduce load, pursuant to subsection (a)(1) of this section.

. . . .

§839f. Administrative provisions

. . . .

(e) Judicial review; suits

(1) For purposes of sections 701 through 706 of Title 5, the following actions shall be final actions subject to judicial review -

(A) adoption of the plan or amendments thereto by the Council under section 839b of this title, adoption of the program by the Council, and any determination by the Council under section 839b(h) of this title;

(B) sales, exchanges, and purchases of electric power under section 839c of this title;

(C) the Administrator's acquisition of resources under section 839d of this title;

(D) implementation of conservation measures under section 839d of this title;

(E) execution of contracts for assistance to sponsors under section 839d(f) of this title;

(F) granting of credits under section 839d(h) of this title;

(G) final rate determinations under section 839e of this title; and

(H) any rule prescribed by the Administrator under section 839e(M)(2) of this title.

(2) The record upon review of such final actions shall be limited to the administrative record compiled in accordance with this chapter. The scope of review of such actions without a hearing or after a hearing shall be governed by section 706 of Title 5, except that final determinations regarding rates under section 839e of this title shall be supported by substantial evidence in the rulemaking record required by section 839e(i) of this title considered as a



whole. The scope of review of an action under section 839d(c) of this title shall be governed by section 706 of Title 5. Nothing in this section shall be construed to require a hearing pursuant to section 554, 556, or 557 of Title 5.

(3) Nothing in this section shall be construed to preclude judicial review of other final actions and decisions by the Council or Administrator.

(4) For purposes of this subsection -

(A) major resources shall be deemed to be acquired upon publication in the Federal Register pursuant to section 839d(c)(4)(B) of this title;

(B) resources, other than major resources, shall be deemed to be acquired upon execution of the contract therefor;

(C) conservation measures shall be deemed to be implemented upon execution of the contract or grant therefor; and

(D) rate determinations pursuant to section 839e of this title shall be deemed final upon confirmation and approval by the Federal Energy Regulatory Commission.

(5) Suits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions

taken pursuant to this chapter by the Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this chapter, the Bonneville Project Act [16 U.S.C.A. § 832 et seq.], the Act of August 31, 1964 (16 U.S.C. 837-837h), or the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), shall be filed in the United States court of appeals for the region. Such suits shall be filed within ninety days of the time such action or decision is deemed final, or, if notice of the action is required by this chapter to be published in the Federal Register, within ninety days from such notice, or be barred. In the case of a challenge of the plan or programs or amendments thereto, such suit shall be filed within sixty days after publication of a notice of such final action in the Federal Register. Such court shall have jurisdiction to hear

and determine any suit brought as provided in this section. The plan and program, as finally adopted or portions thereof, or amendments thereto, shall not thereafter be reviewable as a part of any other action under this chapter or any other law. Suits challenging any other actions under this chapter shall be filed in the appropriate court.

. . . .

§ 839g. Savings provisions

(a) Rights of States and political subdivisions of States

Nothing in this chapter shall be construed to affect or modify any right of any State or political subdivision thereof or electric utility to -

(1) determine retail electric rates, except as provided by section 839c(c)(3) of this title;

(2) develop and implement plans and programs for the conservation, development, and use of resources; or

(3) make energy facility siting decisions, including, but not limited to, determining the need for a particular facility, evaluating

alternative sites, and considering  
alternative methods of meeting the  
determined need.

. . . .

APPENDIX F

42 U.S.C. CHAPTER 55 - NATIONAL ENVIRON-  
MENTAL POLICY ACT

. . . .

§ 4331. Congressional declaration of  
national environmental policy

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster

and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may -

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted



and administered in accordance with the policies set forth in this chapter, and  
(2) all agencies of the Federal Government shall -

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

- (i) The State agency or official has statewide jurisdiction and has the responsibility for such action,
- (ii) the responsible Federal official furnishes guidance and participates in such preparation,
- (iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and
- (iv) after January 1, 1976, the responsible Federal official

provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by state agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.



## APPENDIX G

### WASHINGTON STATE ENVIRONMENTAL POLICY ACT

#### REVISED CODE OF WASHINGTON

#### § 43.21C.020. Legislative recognitions - Declaration - Responsibility

(1) The legislature, recognizing that man depends on his biological and physical surroundings for food, shelter, and other needs, and for cultural enrichment as well; and recognizing further the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource utilization and exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Washington, in cooperation with federal and local

governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to: (a) Foster and promote the general welfare; (b) to create and maintain conditions under which man and nature can exist in productive harmony; and (c) fulfill the social, economic, and other requirements of present and future generations of Washington citizens.

(2) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:



(a) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) Assure for all people of Washington safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(c) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) Preserve important historic, cultural, and natural aspects of our national heritage;

(e) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(f) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(g) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

§ 43.21C.030. Guidelines for state agencies, local governments - Statements - Reports - Advice - Information

The legislature authorizes and directs that, to the fullest extent possible: (1) The policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all branches of government of this state, including state agencies, municipal and public corporations, and counties shall:

(a) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

(b) Identify and develop methods and procedures, in consultation with the department of ecology and the ecological commission, which will insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations;

(c) Include in every recommendation or report on proposals for legislation and other major actions significantly affecting the quality of the environment, a detailed statement by the responsible official on:

(i) the environmental impact of the proposed action;

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(d) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any public agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments

and views of the the appropriate federal, province, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the department of ecology, the ecological commission, and the public, and shall accompany the proposal through the existing agency review processes;

(e) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(f) Recognize the world-wide and long-range character of environmental problems and, where consistent with state policy, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(g) Make available to the federal government, other states, provinces of Canada, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(h) Initiate and utilize ecological information in the planning and development of natural resource-oriented projects.

§ 43.21C.031. Significant impacts

An environmental impact statement (the detailed statement required by RCW 43.21C.030(2)(c)) shall be prepared on proposals for legislation and other major actions having a probable significant, adverse environmental impact. Actions categorically exempt under RCW 43.21C.110-(1)(a) do not require environmental review or the preparation of an environmental impact statement under this chapter.

An environmental impact statement is required to analyze only those probable adverse environmental impacts which are significant. Beneficial environmental impacts may be discussed. The responsible official shall consult with agencies and the public to identify such impacts and limit the scope of an environmental impact statement. The subjects listed in RCW 43.21C.030(2)(c) need not be treated as separate sections of an environmental impact statement. Discussions of significant short-term and long-term environmental impacts, significant irrevocable commitments of natural resources, significant alternatives including mitigation measures, and significant environmental impacts which cannot be mitigated should be consolidated or included, as applicable, in those sections of an environmental impact statement where the responsible official decides they logically belong.





## APPENDIX H

### MONTANA ENVIRONMENTAL POLICY ACT

#### MONTANA CODE ANNOTATED

75-1-102. Purpose. The purpose of this chapter is to declare a state policy which will encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, to enrich the understanding of the ecological systems and natural resources important to the state, and to establish an environmental quality council.

75-1-103. Policy. (1) The legislature, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding

technological advances, and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Montana, in cooperation with the federal government and local governments and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans.

(2) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the state of Montana to use all practicable means

consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources to the end that the state may:

(a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) assure for all Montanans safe, healthful, productive and aesthetically and culturally pleasing surroundings;

(c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) preserve important historic, cultural and natural aspects of our unique heritage and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(e) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(f) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

. . . .

75-1-201. General directions - environmental impact statements. (1)

The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in this chapter:

(b) all agencies of the state, except as provided in subsection (2), shall:

(i) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(ii) identify and develop methods and procedures which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(iii) include in every recommendation or report on proposals for projects, programs, legislation, and other major actions of state government significantly

affecting the quality of the human environment, a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(C) alternatives to the proposed action;

(D) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(E) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented;

(iv) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;



(v) recognize the national and long-range character of environmental problems and, where consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(vi) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(vii) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(viii) assist the environmental quality council established by 5-16-101; and

(c) prior to making any detailed statement as provided in subsection (1) (b)(iii), the responsible state official shall consult with and obtain the comments of any state agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate state, federal, and local agencies which are authorized to develop and enforce environmental standards shall be made available to the governor, the environmental quality council, and the public and shall accompany the proposal through the existing agency review processes.

(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of this chapter.

. . . .

## APPENDIX I

### IDAHO ENABLING LEGISLATION

#### IDAHO CODE

61-1201. Agreement for state participation in the Pacific Northwest Electric Power and Conservation Planning Council.-

The state of Idaho agrees to participate in the formation of the "Pacific Northwest Electric Power and Conservation Planning Council," created pursuant to the Pacific Northwest electric power planning and conservation act. Nothing in this agreement shall be construed to alter, diminish or abridge the rights of the state of Idaho and its citizens with respect to any water or water related right and those relating to the regulation of the energy industry.

. . . .

61-1203. Term of office of council members - Filling of vacancies.- (1)

Unless removed at the governor's pleasure, each member appointed to the council shall

serve for a term of three (3) years, except that, with respect to members initially appointed, the governor shall designate one (1) member to serve a term of two (2) years and one (1) member to serve a term of three (3) years. Absent removal by the governor, terms shall commence and end on January 15.

## APPENDIX J

### MONTANA ENABLING LEGISLATION

#### MONTANA CODE ANNOTATED

90-4-401.      Agreement to pacific northwest electric power and conservation planning council.      The state of Montana agrees through this part and through the appointment of persons as provided in this part to formation of and participation in the pacific northwest electric power and conservation planning council, hereafter referred to in this part as "the council", and to the performance of the functions and duties of the council as provided in the Pacific Northwest Electric Power Planning and Conservation Act (P.L. 96-501).

90-4-402.      Appointment of council members by governor.      (1)      The governor shall appoint at the beginning of each gubernatorial term two persons to serve as members of the council as provided in P.L. 96-501.

(2) An appointment of a council member by the governor is subject to the confirmation of the senate, except that the governor may appoint a council member to assume office before the senate meets in its next regular session to consider the appointment. A member so appointed is vested with all the functions of the office upon assuming the office and is a de jure officer, notwithstanding the fact that the senate has not yet confirmed the appointment. If the senate does not confirm the appointment of a member, the governor shall make a new appointment.

(3) A council member serves at the pleasure of the governor. The governor may remove a council member at any time and appoint a new member to the office.

## APPENDIX K

### OREGON ENABLING LEGISLATION

#### OREGON REVISED STATUTES

469.800     Oregon participation in Pacific Northwest Electric Power and Conservation Planning Council.     The State of Oregon agrees to participate in the formation of the Pacific Northwest Electric Power and Conservation Planning Council pursuant to the Pacific Northwest Electric Power Planning and Conservation Act of 1980. Public Law 96-501. Participation of the State of Oregon in the council is essential to assure adequate representation for the citizens of Oregon in decision making to achieve cost-effective energy conservation, to encourage the development of renewable energy resources, to establish a representative regional power planning process, to assure the Pacific Northwest region of an efficient and adequate power supply and to fulfill the other purposes stated in section 2 of Public Law 96-501.





## APPENDIX L

### WASHINGTON ENABLING LEGISLATION

#### REVISED CODE OF WASHINGTON

#### 43.52A.010. State agreement to participate in Pacific Northwest Electric Power and Conservation Planning Council

The state of Washington agrees to participate in the Pacific Northwest Electric Power and Conservation Planning Council pursuant to the Pacific Northwest Electric Power Planning and Conservation Act.

#### 43.52A.040. Terms of members - Vacancies - Residence of members

(1) Unless removed at the governor's pleasure, council members shall serve a term ending January 15 of the third year following appointment except that with respect to members initially appointed, the governor shall designate one member to serve a term ending January 15 of the second year following appointment. . . .



## APPENDIX M

### 1983 NORTHWEST CONSERVATION AND ELECTRIC POWER PLAN VOLUME I

[i] Adopted Pursuant to the Pacific  
Northwest Electric Power Planning and  
Conservation Act of 1980 (P.L. 96-501)  
April 27, 1983

#### [4-2] Summary of Results

The plan includes a range of four alternative forecasts of demand based on different plausible scenarios of the Northwest economy. When no conservation programs were included, the Council's alternative sets of assumptions about the regional economy resulted in demand forecasts ranging from an annual growth rate of 2.5 percent in the high growth forecast to 0.7 percent in the low growth forecast. Two intermediate growth forecasts, medium-high and medium-low, predict annual demand growth rates of 1.5 and 2.1 percent. The range covered by these forecasts is wide. By the year 2002, there is a difference of nearly 8,400 average megawatts of demand between the high and low forecasts. When transmission

and distribution losses are included, this implies that the high growth forecast would require 9,000 average megawatts more new resources than the low forecast.

Figure 4-3 displays the Council's four principal forecasts from 1981 to 2002. Table 4-1 shows the demand projections and the total percent increase of average retail prices of electricity adjusted for inflation. Satisfying each level of demand requires a combination of conservation resources to reduce the need for electricity and generating resources to produce electricity. The additional resources needed to meet the high growth forecast would increase the average price of electricity by 80 percent adjusted for inflation from 1981 levels. This means that the average prices expressed in 1980 dollars charged by investor-owned utilities and public agencies, weighted by their respective sales, would increase

from 2.0 cents per kilowatt-hour in 1981 to 3.6 cents in 2002. If regional demand for electricity turned out to be at the lower end of the range, prices would be only 2.1 cents per kilowatt-hour in 2002.

Dramatic price increases from 1981 through 1984, primarily caused by thermal construction costs that already have been incurred, are present in all four forecasts. The 1985 prices shown in figure 4-4 are all near 2.7 cents per kilowatt-hour. With inflation added, 1985 rates would be about 3.7 cents per kilowatt-hour. As illustrated in figure 4-4, price changes after 1985 differ greatly depending on the need for new resources. These patterns reflect the fact that new resources are far more expensive than existing resources.

The price projections shown in figure 4-4 assume the resources selected in this

plan, and therefore reflect the minimum cost of meeting either the high or low load forecast. A different mix of resources could increase the price projections. For example, if the conservation resource is not fully realized, the region will have to turn to more costly generating resources. If this happens, the prices that will occur will be significantly higher than these projections for both the high and low forecast.

Clearly, providing electricity for a high growth rate in the region is expensive. If the region's economy is indeed booming, it can well afford the additional expense, although fixed-income and low-income households [4-3] would be hurt by this increase in their cost of living. It would be a costly mistake, however, to commit to high growth resources if that level of growth failed to materialize.



The following sections describe the Council's forecasts and their underlying assumptions in more detail.

. . . .

[5-15] Because of the current surplus of firm electric energy, the large amount of conservation resource potentially available to the Northwest, and the extremely unlikely possibility that the demand under the high growth forecast will occur, the Council has not felt the need in the first plan to investigate taking risks (of empty reservoirs) with the hydropower system beyond the risks associated with current critical water planning. These issues will be investigated further in the future.

. . . .

[7-1] The key element in the Council's resource portfolio for meeting future energy needs is conservation. This chapter first describes present electric consumption for the region's residential,

commercial, industrial, and irrigated agricultural sectors. It then assesses potential conservation savings for each sector and identifies how much conservation from that sector is included in the Council's resource portfolio.

Conservation involves more efficient use of electricity. This means (a) ensuring that new houses and commercial and industrial facilities are more energy-efficient; (b) installing more efficient water heaters and appliances; and (c) finding more efficient ways to manufacture products, to perform industrial processes, or to move irrigation water into the fields.

Conservation also involves steps to make existing houses and buildings more energy-efficient by adding insulation in walls and ceilings, installing water heater blankets, and adding other cost-effective conservation measures.

If we could ignore cost, there is technology available to reduce our needs for electricity dramatically. The Council considered any conservation measure as technically achievable if it could improve the efficiency of electric use at a cost of 10 cents (or less) per kilowatt-hour. The Council's assessment of the portion of this technically achievable conservation that can be developed cost-effectively took into account four important factors.

First, the Act grants conservation a 10 percent cost advantage over other resources. This means that a conservation measure can cost 10 percent more than the next lowest-cost resource and still be cost-effective under the Act.

Second, conservation measures also reduce the need for additional transmission lines and other distribution facilities. From the regional perspective, when a conservation action reduces the

need for these facilities, it reduces the associated facilities costs by approximately 2.5 percent.

Third, conservation avoids the "line losses" that occur when electricity is transmitted over long distances. About 7.5 percent of the electricity generated at a power plant is "lost" in transmission to its ultimate point of use. Subsequently, any comparison between a generating resource and conservation must adjust for this fact. Therefore, for purposes of its cost-effectiveness analysis, the Council reduced conservation's cost by 7.5 percent. The combined effect of adjustments for the cost advantage provided by the Act, and transmission cost and line loss savings, is to reduce conservation's cost by 20 percent.

Finally, to assess accurately the amount of cost-effective conservation available, the administrative cost of

programs needed to secure conservation must be included. The Council reviewed current utility conservation programs and those operated by other agencies. This review indicated that conservation program administrative costs are in the range of 15 to 25 percent of the direct cost of measures for fully operational programs. The Council, in its cost-effectiveness evaluations of conservation, has assumed a 20 percent administrative cost.

The Council has established its cost-effectiveness limit at a levelized cost of 4 cents per kilowatt-hour in 1980 dollars. Conservation measures which have an installed cost in excess of this amount are less economically attractive than other new resources the region could acquire. This limit was established by comparing the levelized cost of conservation measures with the levelized cost of other similarly available and reliable resources.

In the Council's high growth forecast, it currently appears that the last resource to be acquired will be a coal plant with a levelized cost slightly above 4 cents per kilowatt-hour. Conservation measures which could displace this coal plant would be considered cost-effective if they were compatible with the existing power system. To assess this, the Council used its strategic planning model and the systems analysis model. Finally, in judging whether conservation was cost-effective, the Council considered its ability to limit the region's exposure to higher risk thermal resources which have long lead times and require large capital investments.

Although the amount of conservation available at 4.0 cents per kilowatt-hour is economically achievable, not all of these savings can be realized. Changes in consumer behavior and consumer resistance,

quality control, and unforeseen technical problems will prevent the region from developing 100 percent of this potential. However, the Council has decided that, using the wide assortment of incentives and regulatory measures the Act makes available, the region's electric consumers could be persuaded to install a large percentage of the economically achievable conservation. The amount of conservation included in the plan and referred to in the following discussions is the net savings the Council anticipates after taking into account all of these factors. The proportion considered realizable under the plan varies from 36 percent for residential appliances to nearly 100 percent for the industrial and irrigation sectors. In aggregate, the Council's plan, under the high growth forecast, calls for the development of approximately 75 percent of the conservation that can be



achievable at a cost equal to or less than 4.0 cents per kilowatt-hour.

The amount of technically and economically achievable conservation is directly related to the amount of energy used. This section describes the amount of electricity presently used in each sector, the amount that would be used if there were no conservation programs, and the savings made possible by the plan. A technical discussion of the Council's conservation assessment appears in Appendix K (Volume II, available on request).

The conservation savings identified in this chapter are higher than other projections made in the region. A major reason is that the analysis assumes the Council's high growth forecast which is based on record economic growth in the region. If one of the Council's lower growth forecasts should occur, fewer new buildings and new factories would be built. Less

total energy would be needed, and consequently less conservation could be saved.

[7-2] Any direct comparison of the Council's conservation assessment with those made by other organizations should take two other factors into account. The supply data used in the plan include all conservation without distinguishing between conservation put into place as a result of specific programs and conservation measures motivated by rising prices of electricity. These estimates are also based on the high penetration rates the Council's plan assumes for each conservation program.

The figures shown do not include any adjustment for line losses. All costs shown are for the direct cost of the measures and do not include program cost, transmission cost savings, or quantifiable environmental costs and benefits.

Residential SectorCurrent Use of Electricity

In 1981, the region's residential sector consumed an estimated 5,323 average megawatts of electricity. This represented approximately 34 percent of the region's total consumption. The two largest residential uses of electricity are space and water heating. Space heat consumption in 1981 was 1,650 average megawatts or 31 percent of the residential use. Electricity used for water heating represented an estimated 26 percent of the residential use, or 1,380 average megawatts. The remaining 2,300 average megawatts (43 percent) were consumed by lights and other appliances.

Potential and Planned Conservation

Council studies indicate significant cost-effective conservation potential in the residential sector. Under the Council's low and medium-low growth

forecasts, residential needs in the year 2002 could be accommodated without using more electricity than in 1981. Even the record population and economic growth rates envisioned by the Council's high growth forecast could double the number of residential customers yet require only one-third more electricity than in 1981.

Three-quarters of the currently identified residential conservation potential is available through more efficient space heating and water heating. The remainder would come from improvements in efficiency of major household appliances, such as refrigerators and freezers, and in lighting. The conservation potential for each of these uses of electricity is discussed in the following paragraphs.

Figure 7-1 shows estimated space heating savings available in existing residences at a cost between 1 and 10

cents per kilowatt-hour. These savings can be achieved through improving the insulation levels, adding storm windows, and reducing the air leakage in existing houses. Of the 770 megawatts of technically achievable space heating conservation shown in figure 7-1, the Council's plan calls for developing 520 megawatts at an average cost of 1.5 cents per kilowatt-hour by the year 2002. This assumes a 33 percent reduction in energy used for space heating.

The Act directs the Council to establish model conservation standards for new buildings. These standards must secure all the power savings that are cost-effective for the region. In addition, they must be economically feasible for consumers. Subsequently, in the development of its model standards for new residential buildings, the Council took into consideration such factors as

mortgage rates, increases in the initial cost of a house to pay for conservation measures, the present and future cost of electricity, and other consumer investment opportunities. To ensure that its assessment of economic feasibility was conservative, the Council deliberately excluded from its analysis the tax deductions a homeowner is permitted for interest paid on home mortgages. The Council also did not include in its calculations the fact that houses built to its model standard will require much smaller and, less expensive heating systems. If both of these factors were included, they would significantly reduce the cost of attaining the Council's standard.

[7-3] As is shown in figure 7-2, a consumer living in a house built to the Council's model standard would use 60 percent less electricity for space heating than in a house built to current codes. Although

a house built to the Council's model standard will have a slightly higher initial cost, over the life of the house the consumer will be economically better off than if living in a house built to current codes. If tax deductions for interest on the added cost of the mortgages and cost savings from smaller heating systems are considered, a consumer's first year combined payment for space heating and mortgage payments will be less than if they purchased a house built to current codes. Figure 7-3 depicts the effects of interest deductions and heating system cost savings for a house built in Seattle or Portland. [7-4] The Council's plan calls for implementing these model conservation standards by January 1, 1986. Figure 7-4 shows the space heating conservation potential in new residences under the Council's high growth forecast. As is shown in this



figure, these model standards could save 880 megawatts by the year 2002. The average cost of these savings is less than 2.0 cents per kilowatt-hour.

. . . .

[9-2] Conservation is not likely to harm fish and wildlife. In fact, by reducing the use of fossil fuels, conservation will benefit fish and wildlife by avoiding unnecessary air and water pollution, transmission lines, mining, habitat interference or destruction, and water use. However, the Council is concerned about the potential indoor air quality impacts of weatherization unless mitigation measures are employed. The Council study noted that residential weatherization could reduce ventilation and cause harmful concentrations of various pollutants from space heating equipment, insulation, and building materials. These pollutants included formaldehyde from particle board and some insulation, and

radioactive emissions from masonry and concrete buildings. The report noted, however, that health levels for these pollutants have not yet been established.

The Council decided that heat exchangers could adequately mitigate these air quality impacts in that they provide adequate ventilation without sacrificing much heat. The Council's model conservation standards include an air-to-air heat exchanger if the house does not meet Bonneville's exemption criteria for air-tightening measures. With this mitigation, the Council believes that conservation is attractive from an environmental perspective.

. . . .

#### CHAPTER 10 Two-Year Action Plan

[10-1] This chapter describes the actions that Bonneville, the Council, and others will take over the next two years. These actions will enable Bonneville to be in a position to acquire the most cost-effective

tive resources throughout the twenty years of this plan.

The Council has concluded that this two-year plan should focus on enhancing the region's capability to (a) implement conservation, (b) develop smaller, more dispersed renewable resources, and (c) shorten the lead time for the siting, licensing, and construction of generating plants. To accomplish those goals, Bonneville must support programs to acquire cost-effective conservation from all major consumer groups (residential, commercial, governmental, industrial, and agricultural). While the rate of conservation acquisitions must reflect the need for power in the region, the development of the capability to acquire conservation cannot wait. Bonneville must be ready to respond on short notice with conservation programs and resources if power demands increase. Currently, Bonneville and the

region's utilities have limited capability to implement conservation programs outside the residential sector. Bonneville must also begin developing resource options. This includes completing the planning and regulatory activities on certain resources and providing services to facilitate the early development of resources that might otherwise be lost to the region, such as cogeneration. Finally, Bonneville must conduct research, development, and demonstration projects to improve the information on which future resource decisions will be made.

It is not possible to forecast the precise resources that will be most cost-effective over the next twenty years. Resources currently projected to serve an unlikely, high demand growth may ultimately be displaced by new technologies and other resources that become more cost-effective, or may not be needed

because high demand growth does not materialize. To respond to changes in demand growth, in available resources, and in resource costs, the Council will review this plan every two years. This two-year process allows the Council to provide much more detail in its conservation program and resource acquisition plan for the beginning of the twenty-year planning period. General guidelines for resource acquisitions appropriate to the later years are inadequate during the early years when Bonneville must start implementing specific conservation programs and acquiring resources.

As described in previous chapters, this plan forecasts regional electric power demands for the twenty-year period over four separate demand growth conditions: low, medium-low, medium-high, and high. The actions in this chapter will develop conservation programs and resource

options that are capable of meeting all demand growth conditions.

[10-3] Figure 10-1 contains a summary of the actions in this two-year plan.

These actions are designed to maintain or improve Bonneville's ability to acquire conservation and other resources when they are needed. Because of the current surplus of power, this two-year plan does not include the acquisition of any conservation or other resource solely for the purpose of acquiring power.

The Council has considered the financial effect these conservation programs may have on Bonneville and the region's ratepayers. The conservation programs are expected to add only 3/100 of a cent per kilowatt-hour (1980 dollars) to the electric rates of consumers over the two-year period. Figure 10-2 illustrates the approximate relationship of the costs of these conservation programs to the

other costs that make up Bonneville's budget.

The Council anticipates that this two-year plan will have only minimal environmental impacts. The major actions over the next two years involve conservation, the most environmentally benign energy resource. To deal with the potential indoor air quality effects associated with weatherization, the Council's model conservation standards include an infiltration package designed to increase ventilation in houses with potential air quality problems. Moreover [sic], conservation measures will create a significant environmental benefit by helping to reduce the need for additional generation of electricity from less environmentally desirable resources. This two-year plan also calls for acquiring options on several hydropower sites in order to test the feasibility of options. The actual



development of these sites could result in some environmental and fish and wildlife impacts. The provisions of the Council's fish and wildlife program covering the Columbia River Basin and this plan's conditions for future hydropower development, along with the site-ranking study of this two-year plan, are expected to minimize those impacts. Other actions in this plan are of a demonstration nature and, as such, are undertaken in part to develop a better understanding of environmental effects.

The Council has determined that the actions in this two-year plan are cost-effective, prudent, and necessary for Bonneville to acquire the lowest cost resources consistent with the priorities, considerations, and other requirements of the Northwest Power Act.

Section 4(d)(2) of the Act provides that all conservation and resource acqui-

sitions by Bonneville "shall" be consistent with this plan, except as otherwise specifically provided in the Act. Section 6 of the Act, dealing with Bonneville resource acquisitions, states:

"(b)(1) Except as specifically provided in this section, acquisition of resources under this Act shall be consistent with the plan, as determined by the Administrator.

(2) The Administrator may acquire resources (other than major resources) under this Act which are not consistent with the plan, but which are determined by the Administrator to be consistent with the criteria of section 4(e)(1) and the considerations of section 4(e)(2) of this Act.

Any major resource acquisition is subject to review by the Council and a Council determination of consistency or inconsistency with this plan. A major resource is a resource with a planned capability greater than 50 average megawatts that is acquired for a period of more than five years.

The Council has used the word "shall" in this two-year action plan, when refer-

ring to actions to be carried out by Bonneville, to express the Council's expectation tha [sic] these actions can and should be implemented. It is the sense of the Council that these actions must be taken now for Bonneville to be able to acquire the lowest cost mix of resources over the next twenty years. The Council will consider Bonneville's record in implementing these actions as a part of any Council proceedings under section 6(c)(2) of the Act, regarding the consistency of major resource proposals with this plan. If significant changes in circumstances occur, this two-year plan can be revised at any time by Council action.

To ensure proper coordination in the implementation of these actions, the Council intends that all Bonneville actions in this two-year plan shall be taken in consultation with the Council.

In addition, the Council requests that by August 1, 1983 Bonneville provide the Council with a schedule and work plan for Bonneville's responsibilities under this chapter.

[10-4] Cost-Effectiveness

In ranking conservation and other resources for this two-year plan, the Council gave priority to resources it determined to be cost-effective. Cost-effectiveness was determined by employing the strategic planning model to identify resources that will meet demands at the lowest cost. The resources selected by use of the strategic planning model were further evaluated by use of the system analysis model. This model simulates the actual operation of the Northwest power system to determine the compatibility of resources with the existing regional power system, including the sale of electricity outside the region. The seasonal characteristics of the resources, their compat-

ibility with the existing power system, their capital commitments and construction periods, and their effects on the environment and fish and wildlife were considered in determining cost-effectiveness. Other considerations affecting the decisions in this two-year plan included the value of maintaining existing programs, the need to acquire certain resources when the opportunities become available, and the need to provide programs to ensure conservation as an available, short-lead-time resource.

Cost-effectiveness is in part a function of the pace and level of new resource development. For instance, when a house is weatherized, a decision must be made as to what measures should be installed. Should a measure that costs 3.8 cents per kilowatt hour be installed? If so, should the next most expensive measure, at 4.2 cents per kilowatt-hour, also be installed? If the Council had

perfect knowledge of the future, the solution would be relatively simple; all measures would be installed that do not exceed a levelized life cycle cost of the most expensive resource planned for acquisition. Because the Council cannot determine what resources might be needed, the Council must set this cost-effectiveness limit with imperfect knowledge.

The Council has determined that for purposes of these conservation programs, all measures that have an installed cost at or below 4.0 cents per kilowatt-hour are cost-effective to the region and should be installed. This 4.0 cents per kilowatt-hour limit was selected based upon the cost-effectiveness studies described above, which included comparative cost of other resources. It represents a level of conservation investment that, in the Council's analysis, is cheaper than any thermal power plant that may be needed during the twenty-year

planning period. The Council estimates that the average cost of the conservation programs will be 1.8 cents per kilowatt-hour.

If a cost-effectiveness figure lower than 4.0 cents per kilowatt-hour had been selected and less conservation were acquired, the region would be foregoing cost-effective opportunities for conservation; if demand was to grow fast enough, the region would later have to acquire a more expensive thermal plant in place of the lost conservation. On the other hand, if the Council had selected a higher cost-effectiveness figure, the region would be purchasing conservation that would be more expensive than thermal resources in this plan. The Council will be re-evaluating this cost-effectiveness limit as the extent of future demand growth becomes more clear.

All costs in this two-year action plan, including the regional cost-effec-



tiveness level of 4.0 cents per kilowatt-hour, are levelized life-cycle costs expressed in 1980 dollars. Levelized life-cycle costs were determined using a 3 percent real discount rate and conventional levelizing methods. (See Appendix K, Volume II, available on request, for specific procedures and assumptions.) For the purpose of determining the cost-effectiveness of conservation, the costs of administering conservation programs were included. Conservation also receives benefits from not having transmission and distribution costs and line losses and from the 10 percent cost advantage included in the Act.

#### Transition Resources

Chapter 5 explains that the cost-effectiveness of resources was determined based upon all costs borne by the region's ratepayers, rather than only those costs borne by Bonneville. Viewing resource costs from a regional ratepayer perspec-

tive requires special consideration of so called "transition plants," those resources now built or under construction that were not used to meet regional demand in the year prior to the enactment of the Act. Transition plants (such as Boardman, Valmy 1 and 2, Colstrip 3 and 4, and the privately owned share of WPPSS 3) were assumed in this plan to be completed and to be available to meet regional demand. They present a problem because their incremental costs, the costs to complete and operate them, are lower from the viewpoint of the regional ratepayers as a whole than their likely costs to Bonneville if they were to be acquired. A transition plant might be ranked as very cost-effective from the regional ratepayers' perspective but not cost-effective at all from Bonneville's perspective. Use of the regional ratepayers perspective might cause the apparent anomaly of Bonne-

ville's having to acquire a relatively expensive transition plant when conservation or other resources that would cost Bonneville less might be available. (The Council has found that even on a "cost to complete" basis WPPSS 4 and 5 would not be the preferred thermal resources for meeting high regional demand growth, if a decision had to be made now. Otherwise, the Council has assumed that all other resources under active construction in the year prior to the passage of the Northwest Power Act will be completed.

Acquisition of a major resource by Bonneville requires that the acquisition be consistent with this plan, with the Council reviewing Bonneville's decision and determining consistency. Necessarily, the decision on acquisition of a specific resource involves more than the decision to include generic resources in the plan. For instance, while the Council

gave due consideration to environmental and fish and wildlife concerns to the extent practicable when including resources in the plan, the acquisition decision will require such consideration on a site-specific basis. Clearly, ~~site-specific~~ information is not available at the time of planning. The Council expects to take a detailed look at all the consequences of any proposed acquisition when determining consistency.

Since Bonneville will not be needing any additional resources in the immediate future, and there is little danger that the major transition plants which are complete or near completion will be lost to the region after the surplus is over, the Council believes there currently is no need to resolve the treatment of transition plants.

[10-5] When additional demands are placed on Bonneville and one or several of the

transition plants are offered for acquisition, the Council anticipates that acquisition by Bonneville of a transition plant would be appropriate under the following conditions:

The plant is included in this plan as being necessary to meet regional loads;

The acquisition price does not exceed the fully allocated cost of the plant;

The region does not experience significant additional environmental costs from the acquisition; and

The acquisition would result in net benefits to the region through greater reliability, lower total regional financing costs, reduced environmental costs, or other factors.

These conditions should be evaluated at the time of acquisition.

#### Conservation Program

As explained under Cost-Effectiveness, the Council has determined that conservation investments are cost-effective to the region if the installed cost of any measure does not exceed 4.0 cents per

kilowatt-hour saved. The Council also has determined that it is cost-effective for Bonneville to continue its existing conservation programs (modified as provided in this plan), despite the current surplus. The region must not lose the benefits of investments made to date or lose the ability to accelerate conservation programs when demand begins to grow. The effectiveness of conservation programs depends upon the involvement of all 8 million consumers of electricity in the Northwest. A program involving so many people must not be subjected to repeated starts and stops in response to short-term power resource conditions. Conservation is unique in the ability it offers to adjust to the pace of resource acquisition that is needed. Conservation can serve that function, however, only if programs are developed, tested, and maintained throughout the planning period.

Table 10-1 provides the two-year (1985) five-year (1988), and twenty-year (2002) [10-6] conservation targets for each of the Council's four growth forecasts.

This table reveals that depending upon the rate of economic growth, the Council forecasts that the region should acquire between 660 and 4,790 megawatts of conservation by the year 2002 (in the low growth forecast, conservation programs and model conservation standards would add approximately 400 megawatts more than the estimate of regional needs over the twenty-year period). During the next two years the residential sector conservation provides approximately 50 percent of these savings, the commercial sector 25 percent, the governmental sector 5 percent, the industrial sector 10 percent and the agricultural sector 10 percent (see figure 10-3). Bonneville should diversify its conservation efforts to develop capability



in all sectors. The pace of these programs has been designed to enhance the region's ability to finance, develop, test, and implement new programs that serve all sectors, while taking the current surplus into account.

The conservation programs described in this chapter address problems that have hindered conservation efforts during the past decade. The Council believes the plan's conservation programs must be ambitious if conservation is to fulfill the role assigned to it by Congress. The Council will monitor these programs closely to ensure that the lessons learned can be translated into revisions to the plan and can result in improved confidence regarding the reliability of the region's "conservation resource."

The general aim of the Council's conservation programs is to build the capability of the region's conservation

system to ensure that, as the current power surplus diminishes, Bonneville, utilities, state and local governments, and the private sector will be able to acquire cost-effective conservation at a pace sufficient to meet the Council's long-run conservation targets. This will require the development and implementation of new conservation programs as well as the modification of existing programs. In addition to bolstering the region's conservation system, the programs are designed to promote efficiency, diversity, competition, and equitable distribution in the provision of conservation services.

Bonneville's basic role in this overall scheme is to provide financial assistance for conservation improvements that are cost-effective for the region. To guarantee that such regionally financed improvements are accomplished efficiently and effectively, the Council's program

includes requirements designed to avoid repeated retrofits of the same building, to ensure quality in workmanship, and to improve the skill and accuracy of those individuals who determine which conservation measures are cost-effective for a specific building. In addition, the programs define a number of actions to improve the operation of the market for conservation services and include research and demonstration projects to improve information about indoor air quality, solar space and water heating, heat pump water heaters, and other matters of interest to the region's consumers.

References are made in this two-year action plan to the implementation of certain programs "throughout the region." Specifically, these programs relate to (a) reimbursing code enforcement agencies for certain incremental costs associated with the model conservation standards, (b)

providing educational programs regarding the model conservation standards, and (c) providing consistent procedures for certifying compliance with the model conservation standards. The Council intends that funding for these programs be provided regardless of the status of local utility contracts with Bonneville and the specifics of local government and utility boundaries. The Council made this decision because (a) utilities that are not currently placing their demands on Bonneville could do so during the twenty-year planning period, and (b) enforcement of the model conservation standards and education and certification programs must be implemented regionwide to be effective.

Finally, the Council's programs envision the development of a decentralized market for the delivery of conservation services in the region. There are provisions designed to encourage a more

active role for qualified private contractors in the marketing of conservation services. The programs aim to encourage local utilities, state and local governments, and private firms to contract directly with Bonneville to provide conservation savings. This decentralization will help serve the diverse needs of the region as well as increase the overall capabilities of the region's conservation system.

The conservation programs focus on the attainment of six long-term goals:

- Make existing and new residential and non-residential buildings as cost-efficient as current technology and life-cycle economics allow;

- Operate buildings that use electricity in an energy-efficient manner;

- Use renewable resources, in particular passive solar applications, in new and existing residential and non-residential buildings where their use is economically justified;

- Cause industrial electric processes, commercial equipment, and household appliances to be as energy-efficient as current technology and life-cycle economics allow;

Cause energy-management considerations to be an integral part of the planning and administrative processes of local and state governments and the private sector; and

[10-7] Make arrangements to allow government, utilities, and the private sector to share energy-management resources, information, technical expertise, and experience.

These conservation programs are discussed by sector: residential, commercial, industrial, irrigation, and state and local governments. Where appropriate the sectors are separated into programs for new and existing buildings, and specific acquisition targets are provided. A separate discussion of power system conservation also is provided.

1. Residential Sector - Existing Buildings

Bonneville currently offers a residential conservation program for existing buildings. Because of the present surplus of power, the program is being operated at what Bonneville regards as the minimum level of activity necessary to maintain

the region's conservation delivery system for the sector. The Council has decided upon a number of changes that are to be incorporated into Bonneville's program at this time.

A fair and effective residential conservation program must be able to achieve cost-effective energy savings in dwellings occupied by all kinds of households. Current studies demonstrate that utility conservation programs in the Northwest have not been successful in reaching low-income and rental households. The reasons are clear. Conservation programs that do not pay the full cost of the measures exact an entrance fee from the homeowner. Access to the program is dependent upon the homeowner's ability to bear the unreimbursed costs. This situation is aggravated if the program requires, as the Council's program does, the installation of all structurally feasible



and regionally cost-effective measures as a condition of receiving Bonneville financial assistance. The homeowner cannot trim costs by rejecting cost-effective measures. For households with a low income, cost becomes a barrier to participation. For tenants, it makes little sense to pay for weatherizing the landlord's property. For landlords, cost and competitive market conditions can often make weatherization a poor investment. Moreover, in the case of both low-income households and tenants, there is reason to believe that improved marketing of conservation programs could improve participation rates.

Section 6(k) of the Northwest Power Act requires that Bonneville distribute the benefits of its resource programs "equitably throughout the region." The Council has concluded that this requires reasonable access to residential conserva-

tion benefits by both low-income consumers and tenants.

To bolster the conservation system serving low-income households and tenants, this plan includes (a) a low-income program that pays 100 percent of the actual cost of all cost-effective conservation measures, and (b) penetration rates for low-income households and tenants which are at least proportionate to their respective shares of all electrically heated households in some reasonably defined geographic area (such as a city, county, or utility service area). For example, if 30 percent of the electric heat customers in a utility's service area are tenant-occupied units, then at least 30 percent of the electric heat units weatherized each year must be renter-occupied.

Bonneville's conservation program for existing residential buildings shall:

1A. Include all regionally cost-effective measures (including direct application renewable resources) that conserve electricity in existing residential buildings which use electricity for space heating or water heating. The program shall include both owner-occupied and rental buildings.

1B. Require an audit of the building as a condition of receiving Bonneville financial assistance. The audit shall identify all structurally feasible and regionally cost-effective conservation measures.

1C. Require, as a condition of receiving Bonneville financial assistance, the installation of all structurally feasible and regionally cost-effective conservation measures.

1D. Provide financial assistance at levels not lower than Bonneville's current program, which will achieve the Council's energy savings target in the residential sector, and which will achieve penetration rates for low-income and tenant-occupied electrically heated households at least proportionate to their respective shares of all electrically heated households in a reasonably defined geographic area (e.g., city, county, or utility service area). In no event shall the amount of financial assistance for any measure exceed 4.0 cents per kilowatt-hour.

1E. Provide a program that pays 100% of the actual cost of all structurally feasible and regional cost-effective conservation measures for low income households, at a cost not to exceed 4.0 cents per kilowatt-hour saved. This program shall be made available to households with an annual income below that specified in the formula below.

Household Size	Percentage of Median City or County Household Income	Example Based On Regional Median Income*
1	54%	\$12,455
2	62%	14,300
3	70%	16,146
4	78%	17,911
5	83%	19,144
6	88%	20,297
7	93%	21,450
8+	98%	22,604

\*Shown for illustrative purposes only. Actual income will vary by city or county median income level.

1F. Provide only for hot water efficiency improvements resulting from the installation of hot water heat pumps and solar water heaters. Because the expected lifetime of water heater wraps and thermal improvements to existing tanks is less than the length of the current surplus, these measures are not included at this time.

1G. Provide for local utility or other qualified inspection of the conservation measures before the payment of any financial assistance to the contractor or homeowner and release of the contractor's bond.

1H. Permit and encourage bonded, qualified private contractors to solicit a consumer's business directly, without first going through the local utility. This can be done, for example, through the use of general [10-8] contractors who audit the building for savings of electricity and provide for all structurally

feasible and regionally cost-effective conservation measures. Following approval by Bonneville or the local utility, the measures could then be installed by the general contractor or by subcontractors.

1I. Permit and encourage individual entities other than utilities (such as state and local governments and private firms) to contract directly with Bonneville to provide savings in electric space heating.

1J. Provide certification of energy-efficient electrically heated rental property units.

#### Bonneville Actions

Bonneville shall:

1.1 Modify its existing residential conservation program to incorporate the features previously described and to achieve the following rate of acquisition:

By September 30, 1985, acquire 65 megawatts.

By September 30, 1988, acquire a total of 165 megawatts of which 5 megawatts shall be acquired through the installation of heat pump water heaters or solar water heaters.

1.2 Continue and expand programs such as the Energy Extension Service, which provide technical assistance to residential consumers of electricity.

1.3 Undertake demonstration programs to test the feasibility, effect on market

penetration, and cost-effectiveness of a variety of conservation delivery systems including contracting directly with private energy services firms and local governments to secure residential conservation. Demonstration programs should be selected to reflect adequately the diverse circumstances in the region.

1.4 Develop criteria for the acceptance of programs designed by individual entities (utilities, local and state governments, private firms, etc.) to market residential space and water heating savings directly to Bonneville.

1.5 Establish a certification system and training program for auditors which ensures that they will correctly apply the plan's cost-effectiveness criteria in determining the measures to be installed in each building. As a part of that process, Bonneville should evaluate methods for calculating energy consumption and savings. These methods should be suitable for use by auditors, and the most accurate method for use in the field should be chosen.

1.6 Develop and implement a demonstration program to monitor the performance and cost of solar and heat pump water heaters and passive solar space heating designs in each climate zone. This program shall include at least 600 solar water heaters. This program shall be carried out in cooperation with utilities, state and local governments, trade and professional associations, and other interested parties.

1.7 Design and implement a field research program to identify mechanisms

that will ensure quality control for all measures, specifically including wall insulation and infiltration control measures.

1.8 Design and implement a research program to assess (a) the effect of reduced air infiltration in weatherized homes on the presence of indoor air pollutants, and (b) the effectiveness of mitigation techniques.

1.9 Provide technical and financial assistance to the shelter industry (builders, lenders, appraisers, etc.) for the implementation of a uniform, region-wide energy-efficiency rating system for existing residential buildings. This system should be similar to that used by the Environmental Protection Agency to provide consumers with information about automobile fuel efficiency. The rating system should be usable by the homebuilding and lending industry and by potential home buyers to estimate future use of electricity and to assess qualification for home loans. This rating system should be consistent with that developed for new residential buildings (see Bonneville action 2.7). This system shall be fully implemented on or before January 1, 1986.

#### Council Actions

The Council will:

1.10 Conduct a review of conservation programs in the region to determine whether the penetration rates among low-income and tenant households meet the criteria set forth above.



1.11 Conduct a review of the effect that various financial assistance levels and education programs have had on participation rates in programs currently offered in the region and elsewhere. The analysis [sic] will include an examination of participation by income group and by ownership status.

1.12 Conduct research to assess the effectiveness of alternative conservation delivery systems and financing approaches, including full-cost reimbursement for all residential consumers regardless of income or ownership status. These projects will assess the effect of each alternative on:

Desired penetration rates.

Program costs.

Potential versus actual savings.

1.13 To the extent practicable, these research objectives will be coordinated with Bonneville programs currently in place or those soon to be implemented, such as the Hood River and Elmhurst projects.

In addition to these changes, the Council intends to examine the approach described below as a potential change to Bonneville's residential conservation program for existing buildings

Bonneville's current practice requires that each residential structure undergo a comprehensive audit before participating

in the conservation "buy-back" program. Bonneville then pays up to 29.2 cents for each kilowatt-hour estimated to be saved in a retrofit house during the first year. This method for calculating the payment for conservation savings has an apparent problem in that the payment varies substantially based on the condition of the house and its location. For example, conservation measures applied to a house in a cold climate zone will save substantially more electricity than if applied to a house in a moderate climate [10-9] zone, and therefore will be eligible for a higher payment. However, the cost of installing the conservation measures [sic] does not vary significantly between climate zones.

The Council will consider an alternative method for calculating the payment for savings of electricity that adjusts for the climate zone and existing condition of each house. To reduce the admin-

istration costs associated with each audit, this alternative would offer financing for those conservation measures which on average have been identified as being cost-effective to the region. (Those utilities desiring to provide comprehensive audits, or which are required by federal law to do so, may continue that practice.) If it is determined that certain measures are on average cost-effective to the region and these measures are not present in the house, then the measures would be eligible for Bonneville financing. One advantage of this alternative is that it may reduce the number and length of visits to the house.

This alternative involves five steps. First, the Council would identify all conservation measures which on average are cost-effective to the region. Second, the Council would determine the average cost of those measures on a cost per square

foot basis, assuming that the measures must be structurally feasible. Third, Bonneville, in consultation with the Council, the regions's utilities, and others, would establish a financing rate which would cover a percentage (up to 100 percent) of the average cost of regionally cost-effective measures. More than one financing rate may be necessary to achieve the penetration rates for low-income and renter' households and tenants as required in this plan. The average cost multiplied by the financing rate would yield the acquisition price. Fourth, the consumer would be required to secure at least three contractor bids (one of which the consumer may provide) and to have all structurally feasible, regionally cost-effective measures installed. Fifth, upon inspection and approval of completed work, the consumer would receive a payment equal to the lower of (a) the low bid, or (b) the

acquisition price (i.e., the regional average cost of the work multiplied by the "financing rate").

The Council will seek public comment on this and other alternatives before including any change in the plan. The Council will soon begin a process to consider this matter. In the meantime, Bonneville should ensure that the alternative described above is considered in its conservation programs and contracts and that no action is taken which would prevent its implementation.

#### Expected Cost and Savings of Electricity

Through this program, Bonneville shall acquire 165 megawatts of savings during the next five years. The Council estimates that the average cost of these savings will not exceed 1.9 cents per kilowatt-hour. The marginal cost of individual conservation measures shall not exceed 4.0 cents per kilowatt-hour. These

measures are expected to result in an average savings per building of at least 3,200 kilowatt-hours per year for space heating (a reduction of approximately 35 percent.)

## 2. Residential Sector - New Building Standards

New buildings present one of the most significant opportunities for achieving cost-effective conservation. The installation of measures is far less expensive at the time of construction, and many conservation measures can be incorporated into construction but cannot be installed later without making structural changes to the building. With residential buildings lasting 50 years or more, it is vital to ensure that any building using electric space heat is built to efficient standards - even during periods of surplus.

These model conservation standards have been developed to ensure that new

residential buildings using electric space heat are built to produce all the savings of electricity that are economically feasible for the consumer. To allow adequate time for local review, adoption, and implementation of these standards, the Council has decided that the standards will become effective for all residential buildings that receive building permits on or after January 1, 1986.

The Council's model standard for new residential buildings specifies only the maximum electric energy use permitted for space heating in a new building. It allows designers and builders to select any means to achieve the specified energy-use budget. For example, a house could



attain the Council's standard by increasing the amount of insulation, by using a passive solar design, by heating with geothermal energy, or by combining all three approaches.

The performance standards for the space heating requirements of single-family and multi-family dwellings are shown below:

---

Building Type	Climate Zone*		
	1 (kWh/sq ft/yr)	2 (kWh/sq ft/yr)	3 (kWh/sq ft/yr)
Single-Family	2.0	2.6	3.1
Multi-Family	1.2	2.3	2.8

---

\*Climate zones are based on the number of heating degree days experienced in a particular location (Zone 1: less than 6,000; Zone 2: 6,000 to 8,000; Zone 3: in excess of 8,000).

These standards are based upon the cost of electricity, using the Council's method of estimating space heating needs. Other methods may produce different results for the same measures. However, the Council's estimates of the electricity used by energy-efficient homes in the Pacific Northwest are accurate to within less than 7 percent of their actual use. Also, the Council has not analyzed the economic feasibility of these standards for consumers of other space heating fuels.

These model conservation standards may be adopted and enforced by a state or local government or by utilities where utilities are legally authorized to do so. Those entities which choose not to adopt and enforce the applicable standards should prepare an alternative plan for achieving savings that are comparable to those achievable through the use of the

standards. The alternative plan may employ electric service requirements, rate designs, or any other technique for achieving conservation. Failure to implement the standards or achieve comparable savings will subject utilities to the surcharge provisions of this plan (see Method for Calculating Surcharges, Appendix D).

[10-10] Actions

State governments, local governments, or utilities should:

2.1 By January 1, 1986, adopt and enforce the applicable model conservation standards for new electrically heated residential buildings; or

2.2 By January 1, 1986, adopt and enforce an alternative plan for achieving savings comparable to those that would be achieved through implementation of the applicable model conservation standards. This plan should be developed by or in cooperation with the electric utility or utilities serving the jurisdiction.

Suggested approaches to achieving these residential performance standards are

provided in Appendix J (Volume II, available on request).

### Bonneville Actions

Bonneville shall:

2.3 Develop a consistent procedure for certifying compliance with these model standards. This procedure shall be available on or before January 1, 1985 and shall be offered throughout the region.

2.4 Develop a procedure to review and evaluate alternative plans to achieve comparable savings. This procedure shall be available on or before January 1, 1985.

2.5 Develop and implement an education program regarding the provisions of these model standards for builders, architects, designers, real estate appraisers, code officials, and lending institutions. This program shall be in place and operating by January 1, 1985 and shall be offered throughout the region.

2.6 Assist the U.S. Department of Housing and Urban Development to develop and adopt electric energy-efficiency standards for manufactured housing in the Pacific Northwest. The standards should be cost-effective for the region and economically feasible for owners of manufactured housing. To the extent practicable, these standards should be consistent with the standards in this section for other types of construction.

2.7 Provide technical and financial assistance to the housing industry (including builders, lenders, appraisers,

etc.) for the implementation of a uniform regionwide energy-efficiency rating system for new residential buildings. This rating system should be similar to that used by the Environmental Protection Agency to provide consumers with information about automobile fuel efficiency. The rating system should be usable by the homebuilding and lending industry and potential home buyer to estimate future use of electricity and qualification for home loans. This rating system should be consistent with that used for existing residential buildings. (see Bonneville action 1.9). This system shall be fully implemented on or before January 1, 1986.

2.8 Develop and implement a program which provides incentives for meeting these model standards in residential buildings for which building permits are issued before January 1, 1986. The program shall be designed to result in at least 25 percent of the new residential buildings being built to the Council's model standard between January 1, 1984 and January 1, 1986. This program shall include:

Certification by the local utility, local government, or by independent appraisers of houses which meet or exceed the applicable model standard.

A public education and marketing program which emphasizes the energy-savings features and value of houses that achieve the model standard.

Efficiency awards to builders of houses which meet or exceed the applicable model standard.

2.9 Develop and initiate a program to provide financial incentives to homeowners where governmental entities have adopted and enforced the model standard, or a qualifying alternative plan, prior to January 1, 1986. The incentives provided in this program should be based on the estimated amount of electric energy to be saved by the dwelling (compared to an equivalent dwelling built to current code) between the time it receives its final certificate of occupancy and January 1, 1986. The incentive payment should be set at 4.0 cents per kilowatt-hour saved.

2.10 Pay for the incremental cost above that required to meet current code for a sample demonstration of houses built to the model standards. This program shall include:

A sample of at least 1,000 single-family and 200 multi-family buildings which are separately metered for space heating, waste heating, and other appliance uses. The buildings should be located in proportion to population distribution across the region. The Council will consider a reduction in the sample size upon a demonstration that statistically significant results can be obtained with a small number of units.

A measurement of the level of air infiltration and indoor air quality for the model houses.

Occupant data, including the type and number of appliances owned, family size, use of wood heat, thermostat settings, indoor air

temperature, and other information determined in consultation with the Council.

A control group of comparable buildings built to current code or practice.

These demonstration houses shall be included in the number of houses built to the Council's model standards between January 1, 1984 and January 1, 1986, under the incentive program provided in action 2.7.

The program measures described in actions 2.3, 2.5, and 2.8 shall be carried out in cooperation with state and local governments, utilities, trade and professional associations, and other interested parties.

#### Council Actions

The Council will:

2.11 Investigate the feasibility of incorporating the Council's model standard for new residential buildings into the International Congress of Building Officials (I.C.B.O.) Uniform Building Code.

[10-11] 2.12 Investigate potential additions to the model standard for new residential buildings; in particular, the establishment of energy performance budgets for water heating.



Expected Cost and Savings of Electricity

The Council estimates that these model standards will produce at least 35 megawatts of space heat savings in new buildings built during the next five years, assuming the Council's medium-high growth rate. The Council estimates that the average cost of these savings will not exceed 2.0 cents per kilowatt-hour and projects that these standards will reduce space heating use by 60 percent. The Council further estimates that the cost to Bonneville of implementing these standards will not exceed 4/10 of a cent per kilowatt-hour. The marginal cost of any individual conservation measure needed to achieve these model standards shall not exceed 4.0 cents per kilowatt-hour.

3. Residential Sector - Conversion Standard

It does little good to require that all new residential buildings with electric space heating satisfy model conserva-

tion standards if houses that are not built with electric space heating can be converted to electricity freely. The region would be inviting consumers to circumvent the new building standards. On the other hand, it would be unreasonable to require that all houses meet the new building standard before they can be converted to electric space heating, because certain conservation measures are not structurally or economically feasible in older buildings. To reconcile these differences, the Council has developed a model conservation standard specifically for residential buildings that were granted building permits before January 1, 1986 and are being converted to electric space heating. Residential buildings that are granted building permits after January 1, 1986 will be required to meet the new building standards (Action 2) if and when they are converted to electric space heat.

This standard will ensure that buildings converted to electric space heat from other fuels will meet minimum energy-efficiency requirements. This standard may be adopted by state or local governments or by utilities where they are authorized to do so. Entities which choose not to adopt this standard should prepare an alternative plan that will result in savings which are comparable to the savings achievable through this model standard. Failure to implement this standard or achieve comparable savings will subject utilities to the surcharge provisions of this plan (see Method for Calculating Surcharges, Appendix D).

#### Actions

State governments, local governments, or utilities should:

3.1 By January 1, 1986, adopt and enforce the model conservation standard described in Appendix L for the conversion of residential buildings to electric space heating; or

3.2 By January 1, 1986, adopt and enforce an alternative plan for achieving savings comparable to those that would be achieved through implementation of the model standard.

Appendix L is contained in Volume II, which is available on request. The standard shall be effective for all conversions in which the electric space heating system is installed on or after January 1, 1986.

#### Bonneville Actions

Bonneville shall:

3.3 Develop a consistent procedure for certifying compliance with this model standard. The procedure shall be available on or before January 1, 1985, and shall be offered throughout the region.

3.4 Develop and implement an education program regarding the provisions of this model standard for electricians, furnace dealers, home builders, architects, designers, real estate appraisers, code officials, and lending institutions. This program shall be in place and operating by January 1, 1985, and shall be offered throughout the region.

3.5 Develop a procedure to review and evaluate alternative plans to achieve comparable savings. This procedure shall be available on or before January 1, 1985.

The program measures described in actions 3.3 and 3.4 shall be carried out in cooperation with state and local governments, utilities, trade and professional associations, and other interested parties.

#### Expected Cost and Savings of Electricity

The Council evaluated the potential conversion to electric heat of unweatherized oil and gas heated houses. This assessment revealed that each conversion could cost the region in excess of \$8,300 per building in new resource requirements over the next twenty years. The Council estimates that the model standard will reduce the annual electric space heating needs in an average house by approximately 5,000 kilowatt-hours. These savings will reduce the cost of new resource require-

ments by more than \$3,100 per building by requiring weatherization prior to conversion to electric heat. Total regional savings will vary depending on how consumers respond to future oil and natural gas prices.

#### 4. Residential Sector - New Appliances

The Council decided against adopting model conservation standards for new appliances because appliances now on the market already meet the California appliance efficiency standard and any new standard for appliances should be coordinated with other states.

Nevertheless, a demonstration program would be useful to determine whether financial incentives could produce cost-effective appliance efficiency savings. Many consumers are unaware of the attractive economics of purchasing a slightly more expensive, but markedly more efficient, new refrigerator, freezer or

water heating system when they replace their current appliance. In addition, many major appliance purchases are made by third parties, such as builders and rental property managers, who have little incentive to select efficient [10-12] models. This program is designed to encourage the purchase of new and replacement appliances which are more energy efficient. This program focuses initially on incentives, while investigating the necessity and desirability of adopting standards in the future.

Bonneville's program for new appliances shall:

4A. Focus initially on refrigerators, freezers, water heaters, space and water-heating heat pumps, and solar water heaters.

4B. Provide dealer and/or customer incentives based on the efficiency of new appliances compared to the shipment weighted efficiency of comparable models sold the previous year.

4C. Allow manufacturers and distributors to receive direct payments from Bonneville for appliance savings of



electricity verified by actual appliance sales invoices.

4D. Offer financial incentives, including incentives to dealers, sufficient to reduce the number of older and less-efficient refrigerators and freezers that are being operated in the region.

Bonneville Actions

Bonneville shall:

4.1 Develop and implement a region-wide appliance efficiency demonstration program which incorporates the features described above. This program shall achieve the following rate of acquisition:

By September 30, 1985, acquire 2 megawatts.

By September 30, 1988, acquire a total of 5 megawatts.

The program should assess the feasibility, cost-effectiveness, and effect on the market penetration of (a) offering direct financial incentives to manufacturers, distributors, and/or dealers to encourage the sale of energy-efficient major electric appliances, and (b) offering third-party purchasers (e.g., builders, rental property managers, etc.) direct financial incentives to install

energy-efficient major electric appliances.

4.2 Fund a field research project which assesses the effect of energy-efficient appliances, including heat pump water heaters, on the space heating requirements of fully weatherized residential buildings and new residential buildings that meet the Council's model standards.

4.3 Develop and implement (in cooperation with utilities, trade and professional associations, educational institutions, community organizations, and other interested parties) education and marketing programs regarding energy-efficient appliances for distributors, dealers, and purchasers (homeowners, rental property managers, etc.).

### Council Actions

The Council will:

4.4 Assess the effect of incentive, education, and marketing strategies and programs on consumer purchases of energy-efficient residential appliances.

4.5 Investigate, in conjunction with other states (including California), the desirability and feasibility of establishing uniform appliance efficiency standards.

### Expected Cost and Savings of Electricity

Bonneville shall acquire 5 megawatts of energy savings from more efficient appliances during the next five years.

The Council estimates that the average cost of these savings will not exceed 1.6 cents per kilowatt-hour. The marginal cost of individual appliance conservation savings shall not exceed 4.0 cents per kilowatt-hour.

5. Commercial Sector - Existing Buildings

Bonneville does not currently offer any conservation program for existing commercial buildings (other than government or institutional buildings). This plan calls for the development of a program for this sector which will provide approximately 20 percent of all conservation savings over the next five years assuming the Council's medium-high growth forecast. The rate of acquisition for this program has been established at a minimum level to develop and maintain the region's ability to acquire conservation in this sector.

Bonneville's conservation program for this sector shall:

5A. Include all regionally cost-effective measures in existing commercial buildings that use electricity for space conditioning. A conservation measure shall be deemed to be regionally cost-effective if it has a cost of 4.0 cents per kilowatt-hour or less.

5B. Require, as a condition of receiving Bonneville financial assistance, an audit which meets Bonneville's current minimum requirements for commercial building audits. The audit shall identify all structurally feasible and regionally cost-effective measures that conserve electricity, and shall take into consideration the effect of those measures on the consumption of non-electric energy. Bonneville shall provide reimbursement for auditing costs incurred by commercial customers when audits are performed by qualified personnel according to Bonneville's current minimum requirements, and when the audits result in savings of electricity.

5C. Require, as a condition of receiving Bonneville financial assistance, the installation of all structurally feasible and regionally cost-effective conservation measures, including those operation and maintenance procedures which have simple payback periods of less than one year.

5D. Set financial assistance at a level which will achieve the expected savings of electricity at the lowest possible cost to Bonneville ratepayers, up

to the full cost of the conservation measures, if necessary. In no event shall the amount of financial assistance for any measure exceed the regional cost-effectiveness level of 4.0 cents per kilowatt-hour.

5E. Provide technical assistance and training for commercial sector building operators.

5F. Provide for local utility inspection or other qualified inspection of the conservation measure before the payment of financial assistance to the contractor or release of the contractor's bond.

[10-13] 5G. Allow individual entities other than utilities (such as contractors, state and local governments, and private firms) to receive direct payments from Bonneville for verifiable commercial sector electric energy savings.

#### Bonneville Actions

Bonneville shall:

5.1 Develop and offer a regionwide commercial conservation program which incorporates the features described above. This program shall achieve the following rate of acquisition:

By September 30, 1985 acquire 20 megawatts.

By September 30, 1988, acquire a total of 90 megawatts.

5.2 Support the development and implementation of comprehensive education

and training programs in energy-efficient commercial building design, construction, operation, and maintenance.

Expected Cost and Savings of Electricity

Through this program, Bonneville shall acquire 90 megawatts of savings from existing commercial buildings during the next five years. The Council estimates that the cost of these savings will not exceed 1.9 cents per kilowatt-hour. The marginal cost of any individual conservation measure shall not exceed 4.0 cents per kilowatt-hour.

The average savings in electricity per building is expected to be approximately 30 percent. These savings should be obtained through the implementation of equipment efficiency improvements such as lighting, heating, ventilation, cooking, air conditioning and refrigeration, and building envelope modifications.

6. Commercial Sector - New Building Standard

For the same reasons described under 2. Residential Sector - New Building Standards, it is vital to ensure that commercial buildings using electric space conditioning and/or lighting are built to efficient standards - even during periods of surplus. This commercial building standard has been developed to ensure that new commercial buildings are built to produce savings of electricity that are economically feasible for the consumer. To allow adequate time for adoption and implementation of this standard, the Council has decided that the standard will become effective for commercial buildings that receive building permits on or after January 1, 1986.

This standard is a modified version of the most recent model energy code of the American Society of Heating, Refrigeration and Air Conditioning Engineers



(ASHRAE), ASHRAE 90-80. The standard includes equipment performance specifications, lighting budgets, and minimum building envelope efficiency requirements. The lighting budgets are identical to those now required by Seattle's Energy Code, with the exception of office and retail buildings. The standard for office and retail buildings is equivalent to the office standard currently proposed by the California Energy Commission (1.5 watts per square foot plus an additional 1.5 to 3.0 watts per square foot for task and spot lighting).

This model conservation standard may be adopted and enforced by a state or local government or by utilities where utilities are legally authorized to do so. Those entities which choose not to adopt and enforce the standard should prepare an alternative plan for achieving savings that are comparable to those achievable

through the use of the standard. The alternative plan may employ electric service requirements, rate designs, or any other technique for achieving conservation. Failure to implement the standard or achieve comparable savings will subject utilities to the surcharge provisions of this plan (see Method for Surcharge, Appendix D).

#### Actions

State governments, local governments, or utilities should:

6.1 By January 1, 1986, adopt and enforce the model conservation standard described in Appendix J for new commercial buildings that use electricity for space conditioning; and

6.2 By January 1, 1986 adopt and enforce the model conservation standard described in Appendix J for lighting for new commercial buildings which do not use electricity for space conditioning; or

6.3 By January 1, 1986, adopt and enforce an alternative plan for achieving savings comparable to those that would be achieved through implementation of the model conservation standard for new commercial buildings. This plan should be

developed by or in cooperation with the electric utilities serving the jurisdiction.

Appendix J is contained in Volume II, which is available on request.

### Bonneville Actions

Bonneville shall:

6.4 Develop a consistent procedure for certifying compliance with this model standard. This procedure shall be available on or before January 1, 1985 and shall be offered throughout the region.

6.5 Develop and implement an education program regarding the provisions of this model standard for builders, building owners, architects, designers, real estate appraisers, code officials, and lending institutions. This procedure shall be available on or before January 1, 1985 and shall be offered throughout the region.

6.6 Develop a procedure to review and evaluate alternative plans to achieve comparable savings. This procedure shall be available on or before January 1, 1985.

6.7 Develop and implement a program which provides incentives for meeting this model standard in buildings for which building permits are issued between January 1, 1984 and January 1, 1986. The program shall be designed to achieve at least 15 average megawatts of savings.

This program shall include:

Certification by the local utility, local government, or by independent appraisers of buildings which meet or exceed the model standard.

[10-14] A public education and marketing program which emphasizes the energy-savings features and value of buildings that achieve the model standard.

Financial incentives to architects and engineers to prepare energy-efficient alternative commercial designs which meet the Council's standard and are approved by local building officials. Payment of the incentive shall be contingent upon construction of the building according to the approved design.

Efficiency awards to builders when their buildings meet or exceed the applicable model standard.

6.8 Develop and initiate a program to provide financial incentives to building owners where governmental entities have adopted and enforced the model standard, or a qualifying alternative plan, prior to the required implementation date. The incentives provided in this program should be based on the estimated amount of electric energy saved by the building (compared to current code) between the time it commences normal operation conditions and January 1, 1986. The incentive should be set at 4.0 cents per kilowatt-hour.

The program measures described in actions 6.4, 6.5, and 6.7 shall be

carried out in cooperation with state and local governments, utilities, trade and professional associations, and other interested parties.

### Council Actions

The Council will:

6.9 Investigate potential additions to the model standard for commercial buildings, in particular the establishment of total building energy performance budgets, more stringent lighting standards, and mechanical system specifications. This investigation will include a review of the ASHRAE 90-80E-LIG standard.

6.10 Investigate the feasibility of incorporating the Council's model standard for new commercial buildings into the International Congress of Building Officials (I.C.B.O.) Uniform Building Code.

### Expected Cost and Savings of Electricity

This conservation standard should produce approximately 45 megawatts of savings from new commercial buildings during the next five years, assuming the Council's medium-high growth forecast. The Council estimates that the cost of these savings will not exceed 1.7 cents

per kilowatt-hour. The marginal cost of any individual conservation measure shall not exceed 4.0 cents per kilowatt-hour.

7. Commercial Sector - Conversion Standards

As explained under 3. Residential Sector - Conversion Standard, it does little good to require that all new commercial buildings using electricity for space conditioning satisfy model conservation standards, if buildings that are not built with electric space conditioning can be converted to electricity freely. Accordingly, the Council has developed a model conservation standard specifically for commercial buildings that were granted building permits [sic] before January 1, 1986 and are being converted to electric space conditioning. Commercial buildings that are granted building permits after January 1, 1986 will be required to meet the new building standard if and when they

are converted to electric space conditioning.

This standard will ensure that buildings converted to electric space conditioning from other fuels will meet minimum energy-efficiency requirements. This standard may be adopted by state or local governments or by utilities where they are authorized to do so. Entities which choose not to adopt this standard should prepare an alternative plan that will result in savings which are comparable to the savings achievable through this model standard. Failure to implement this standard or achieve comparable savings will subject utilities to the surcharge provisions of this plan (see Method for Calculating Surcharges, Appendix D).

#### Actions

State Governments, local governments, or utilities should:



7.1 By January 1, 1986, adopt and enforce the model efficiency standard described in Appendix J for conversion of commercial buildings to electric space conditioning; or

7.2 By January 1, 1986, adopt and enforce an alternative plan for achieving savings comparable to those that would be achieved through implementation of the model efficiency standard.

Appendix J is contained in Volume II, which is available on request. The standard shall be effective for all conversions for which the building permit is issued on or after January 1, 1986.

#### Bonneville Actions

Bonneville shall:

7.3 Develop a consistent procedure for certifying compliance with this model standard. This procedure shall be available on or before January 1, 1985, and shall be offered throughout the region.

7.4 Establish a procedure for evaluating alternative plans for achieving implementation of the Council's model efficiency standard for conversion to electric space conditioning. This procedure shall be available on or before January 1, 1985.

7.5 Develop and implement an education program regarding the provisions of this model standard for builders,

architects, designers, real estate appraisers, code officials, and lending institutions. This program shall be available on or before January 1, 1985, and shall be offered throughout the region.

E

The program measures described in actions 7.3 and 7.5 shall be carried out in cooperation with state and local governments, utilities, trade and professional associations, and other interested parties.

[10-15] Expected Cost and Savings of Electricity

The council evaluated the potential for conversion to electric space conditioning of existing oil and gas heated and cooled commercial buildings. This assessment revealed that each conversion could cost the region in excess of \$6,000 per average kilowatt of new resource requirements over the next twenty years. This standard is expected to reduce that cost by requiring cost-effective lighting, heating, ventilation and air conditioning, and water heating efficiency improvements

prior to conversion to electric space conditioning. Total regional savings will vary depending upon how consumers respond to future oil and natural gas prices.

8. Commercial Sector - Demonstration Program

The Council's model conservation standard for new commercial buildings is a slightly modified version of the ASHRAE 90-80 model energy code. That code does not attempt to capture all savings of electricity that are possible below a cost of 4.0 cents per kilowatt-hour, nor even all those that are economically feasible for consumers. The Council is confident, based upon its studies, that additional savings can be achieved at prices that are cost-effective to Bonneville and economically feasible for consumers. This program is designed to acquire some of those savings and develop better information about actual levels of use of electricity and potential savings of electricity in commercial buildings. As the

need for additional resources develops, the Council will be in better position to forecast the conservation available in this area, and Bonneville will be in a position to accelerate its program to acquire more savings.

The objective of this program is to develop a conservation program or model standard for acquiring energy-efficiency improvements in commercial buildings beyond those required by the model conservation standards in Action 6.

This program shall include:

8A. Financial incentives payable to architect/engineers, developers, contractor/builders, and others who design and build commercial buildings that operate below a specified energy performance budget.

8B. Technical and financial assistance to local governments to adopt model conservation standards for new commercial buildings which exceed the Council's standards by providing technical and financial assistance in the development and implementation of such standards.

8C. Incentive payments, set at an amount up to the regional cost-effective limit of 4.0 cents per kilowatt-hour, for the value of savings in electricity

achieved beyond those that would be realized at the energy performance budget specified below. These incentives shall be offered for all buildings that use electricity, regardless of the type of space conditioning system.

### Bonneville Actions

Bonneville shall develop a demonstration program for acquiring commercial conservation savings beyond the savings that would be realized under the Council's model standard. Specifically, Bonneville shall:

8.1 Design and initiate a demonstration program which offers financial incentives to secure construction of a total of 30 buildings, from at least five different building categories. Incentives of 4.0 cents per kilowatt-hour on a levelized life-cycle cost basis shall be paid for every kilowatt-hour of savings which exceeds the Council's model conservation standard for new commercial buildings. Only those buildings that meet or exceed the following total energy budgets under normal operating conditions will be eligible for the incentive.

8.2 Develop data on the construction cost, actual and projected energy consumption, and features of very efficient commercial buildings constructed in climates similar to those found in the region.

Expected Cost and Savings of Electricity

Savings from this program are not currently included in the Council's resource portfolio. This plan calls for developing, by 1988, a conservation program or model standards for acquiring savings of electricity in new commercial buildings in excess of the Council's model standard. The Council anticipates that this program could produce a 30 percent improvement in commercial building efficiency over the Council's model standards, at a cost of below 4.0 cents per kilowatt-hour.

9. Industrial Sector

The great variety of industrial uses of electricity in the Northwest and the inaccessibility of certain proprietary information make it difficult to develop model conservation standards or a uniform conservation program for the industrial sector. The Council has concluded that the most effective way to acquire indus-

trial conservation may be through the use of financial incentives.

For this program to work effectively, Bonneville must fund technical assistance for industrial consumers to help them identify their potential savings, and must provide consistent guidelines in its acquisition requests. When Bonneville acquires conservation from this sector, Bonneville should publish a notice of its requirements and solicit conservation proposals from Northwest industrial consumers. Bonneville can then evaluate the proposals and select those that offer the most cost-effective savings.

Bonneville does not currently offer an industrial conservation program. This program is designed to develop the Council's and Bonneville's understanding of the potential for conservation in the industrial sector and place Bonneville in



a position to acquire industrial conservation when it is needed.

[10-16] Bonneville's program for this sector shall include:

9A. Solicitation of industrial conservation projects either by Bonneville or through retail utilities. The solicitation document shall describe the characteristics of the conservation that is needed, state a maximum acquisition price, and contain other terms and conditions that would be necessary in preparing a proposal.

9B. Payments at a level that will achieve the expected electricity savings at the lowest possible cost to Bonneville ratepayers, up to the full cost of the conservation measures, if necessary. In no event shall the payment for any measures exceed the regional cost-effectiveness level of 4.0 cents per kilowatt-hour saved.

9C. Independent verification of efficiency improvements.

9D. Technical assistance for industrial customers who request it, for the purpose of identifying industrial conservation projects.

#### Bonneville Actions

Bonneville shall:

9.1 Develop a regionwide industrial conservation program which incorporates the features described above. This

program shall achieve the following rate of acquisition:

By September 30, 1985, acquire 15 megawatts.

By September 30, 1988, acquire a total of 45 megawatts.

### Council Actions

The Council will:

9.2 Conduct, in cooperation with the region's industrial customers, a detailed survey to identify industrial conservation potential above the 545 megawatts contained in the Council's resource assessment. This survey should identify conservation potential up to a cost of 5.0 cents per kilowatt-hour.

### Expected Cost and Savings of Electricity

This program shall produce 45 megawatts of savings during the next five years. The Council estimates that the cost of these savings will not exceed 1.6 cents per kilowatt-hour. The marginal cost of individual conservation measures shall not exceed 4.0 cents per kilowatt hour.

### 10. Irrigation Sector

Developing conservation programs for the irrigation sector presents prob-

lems similar to those in the industrial sector. There are a wide variety of irrigation techniques, soil conditions, crop requirements, and other conditions that make it difficult to impose model conservation standards or develop a uniform conservation program for this sector. The Council therefore proposes a conservation acquisition program similar to the one proposed for the industrial sector.

The objective of this program is to acquire efficiency improvements in the use of electricity on new and existing irrigated acreage. Bonneville's program for this sector shall include.

10A. Solicitation for irrigation conservation projects either by Bonneville or through retail utilities. The solicitation document shall describe the characteristics of the conservation that is needed, state a maximum acquisition price, and contain other terms and conditions that would be necessary in preparing a proposal.

10B. Support for technical assistance to irrigation consumers through such existing agencies as the Agricultural Extension Service.

10C. Payments at a level which will achieve the expected savings of electricity at the lowest possible cost to Bonneville ratepayers, up to the full cost of conservation measures, if necessary. In no event shall the payment for any measure exceed the regional cost-effectiveness level of 4.0 cents per kilowatt-hour.

10D. Financial assistance to lending institutions and other agencies which provide below-market rate loans or other forms of financial assistance to customers for the purchase and installation of energy-efficient irrigation systems or for efficiency improvements to existing irrigation systems.

10E. A requirement, as a condition of participating in incentive programs, that irrigation systems installed on newly irrigated lands be designed to produce all savings in electricity that are cost-effective to the region. Incentive payments shall be made available to defray increased capital costs associated with such installations. Irrigators who decline to participate shall not be eligible for subsequent retrofit payments covering efficiency improvements that could have been effected when their systems were installed.

#### Bonneville Actions

Bonneville shall:

10.1 Develop a regionwide irrigation conservation program which incorporates the features described above. This program shall achieve the following rate of acquisition:

By September 30, 1985, acquire 15 megawatts.

By September 30, 1988, acquire a total of 35 megawatts.

10.2 Initiate a demonstration project which assesses the feasibility and cost-effectiveness of working through agricultural lending institutions and other agencies to facilitate irrigation sector conservation.

10.3 Initiate a request for commercial demonstrations of irrigation system efficiency improvements, including but not limited to flow meter development, deficit irrigation, low-energy precision application systems, irrigation scheduling, and advanced pump designs.

10.4 Initiate a demonstration project to identify technically sound and practically valid soil monitoring and irrigation scheduling programs.

[10-17] 10.5 Develop and implement programs, through government agencies, universities, and other existing institutions, to train irrigation specialists in soil moisture monitoring and irrigation scheduling.

10.6 Develop and implement education programs to demonstrate the potential for electricity and cost savings through soil moisture monitoring and improved irrigation application techniques and systems.

10.7 Initiate a market and technical assistance program to aid farmers and irrigation investment decisionmakers in making sound, cost-effective investment decisions on conservation equipment.

Expected Cost and Savings of Electricity

This program shall produce 35 megawatts of savings during the next five years. The Council estimates that the cost of these savings will not exceed 1.6 cents per kilowatt-hour. The marginal cost of individual conservation measures shall not exceed 4.0 cents per kilowatt-hour.

11. Power System Conservation

The power system offers a number of opportunities for conservation through improvements in the efficiency of generation, transmission, and distribution. Bonneville and the Corps have continuing programs in this area. The Council is unaware of any comprehensive study of potential system conservation, but current information on improvements to hydropower

generation indicates that at least 270 megawatts of savings can be achieved. Coordination of existing programs and a study of other potential improvements could identify substantially greater amounts of low-cost conservation.

The objective of this program is to improve the region's capability to acquire cost-effective conservation through improvements in the efficiency of electric power generation, transmisssion, and distribution.

#### Bonneville Actions

Bonneville shall:

11.1 Continue existing programs to improve the efficiency of power transmission and distribution in the region. These programs shall be modified to the extent necessary to gather data which might be used to identify further efficiency improvements.

11.2 Design and conduct studies of potential improvements that could be made in the efficiency of power generation, transmission, and distribution at a cost of up to 5.0 cents per kilowatt-hour. These studies shall be coordinated with the U.S. Army Corps of Engineers, the



Bureau of Reclamation, and generating utilities. A report on these studies shall be submitted to the Council by January 31, 1985, in order to be considered in the first scheduled review of this plan.

12. State and Local Government

Bonneville's current programs for state and local governments include a street and area lighting efficiency improvement program and an institutional buildings program. Bonneville also offers technical assistance to local governments and small power users, and financial assistance to general purpose local governments and Indian tribes.

The objective of this program is to assist state and local governments to identify and achieve cost-effective electric energy savings and resource development.

Bonneville Actions

Bonneville shall:

12.1 Develop and implement a program to reimburse state and local governments

for the full incremental cost of adopting and enforcing all model conservation standards under this plan, so long as enforcement of the model conservation standards program as a whole is cost-effective. This program shall be in place and operating by January 1, 1985 and shall be offered throughout the region.

12.2 Develop and implement a region-wide acquisition program which purchases savings of electricity from state and local government buildings and facilities. Payments for savings from local government projects shall be made at levels that will achieve savings of 10 megawatts by September 30, 1985, up to the full cost of the conservation measures, if necessary. In no event shall the amount of financial assistance exceed the regional cost-effectiveness level of 4.0 cents per kilowatt-hour.

12.3 Allow state and local governments to receive direct payments from Bonneville for cost-effective conservation savings.

12.4 Provide technical and financial assistance to those jurisdictions and communities wishing to identify conservation and resource development projects.

12.5 Provide technical and financial assistance in the revision and adoption of land-use plans and zoning and subdivision ordinances which affect on-site energy use, solar access protection, solar orientation, and local permitting processes for energy developments.

12.6 Initiate an assessment of energy conservation and resource develop-

ment potential in state and local government owned or operated buildings and facilities. This assessment should take advantage of information already gained from Bonneville's Institutional Buildings Program, Financial Assistance Program, and Local Government Technical Assistance Program. The assessment should be completed by January 1, 1985.

12.7 Support the development of mechanisms to help state and local government, utilities, and the private sector cooperate in conservation and resource acquisitions and to share energy management information, technical expertise, and experience.

12.8 Provide for continuation of Bonneville's Institutional Buildings Program and Local Government Technical Assistance Program at program levels at least equivalent to those provided in 1982-1983.

[10-18] 12.9 Modify its existing Institutional Buildings Program to accommodate more readily the savings in electricity from improvements in water and wastewater treatment systems, and simplify the application process for simple improvements which can be justified without a comprehensive audit.

12.10 Expand regionwide programs which provide technical and financial assistance to state and local government entities to provide assistance in implementing elements of this plan.

12.11 Consult with state and local governments and local government associations regarding the most appropriate

mechanisms to provide for implementation of model conservation standards, technical and financial assistance, and the development and acquisition of local government resources and conservation programs, including those which affect local government buildings and facilities.

12.12 Provide maximum flexibility and full opportunity for state and local governments in the implementation of this plan.

12.13 Terminate financial assistance for street and area lighting improvement during the current period of surplus. Street and area lighting improvements have a short expected lifetime. These improvements would contribute unneeded savings during the surplus but would not last long enough to offset later deficits.

### Council Actions

The Council will:

12.14 Assemble information on the use of electricity in public buildings and facilities and incorporate that information into its analytical system.

12.15 Continue to examine the roles for state and local governments, Bonneville, and the region's utilities, in the implementation of the plan. Disputes regarding these roles may be brought to the Council for clarification of the Council's intention.

### Expected Cost and Savings of Electricity

The savings produced through efficiency improvements in new and existing

government buildings and facilities were developed in conjunction with the commercial sector programs and total 10 megawatts for the next two years. By September 30, 1988, a total of 15 megawatts shall be acquired from this sector, of which 2 megawatts are expected to be produced by water and wastewater system efficiency improvements. These savings are in addition to the commercial sector. The Council's twenty-year target for this sector will be developed following completion of the assessments called for above. The Council estimates that the average cost of these savings will not exceed 1.9 cents per kilowatt-hour. The marginal cost of individual conservation measures shall not exceed 4.0 cents per kilowatt hour.

OTHER PROGRAMSResource and Other Program and Policy Options

This section outlines additional short- and long-term goals and objectives established by the Council. Contained in this section are Council decisions on renewable resources; marketing interruptible power in the region; sales of firm surplus energy in the Southwest; policies on cogenerated electricity, surcharges, and rate design; combustion turbines; methods for quantifying environmental costs and benefits; and a brief summary of additional Council actions during the next two years. This section lists specific actions to be taken by Bonneville and the Council over the next two years and beyond.

One of the central features of this plan is the ability to acquire an option on resources. The current surplus of electricity will provide the region with

time to conduct a thorough analysis of the options concept. The analysis, in consultation with Bonneville, utilities, and resource developers, will seek to identify federal, state, and local laws and regulations and to resolve conflicts that could pose barriers to implementation of resource options.

### 13. Options

The options concept offers significant opportunity for dealing with planning uncertainty. Like a new technology, this new concept will require demonstration and development before it can be depended on to provide planning flexibility. The objective of this program is to work with state siting authorities and federal and state regulatory agencies to resolve institutional, regulatory, legal, and technical barriers to the options concept.

This effort will help to resolve issues about the efficacy of the options



concept, including the extent of control over a resource Bonneville can reasonably expect under an option. To accomplish this, regulatory uncertainties under state and federal laws which may impede development or restrict the usefulness of options must be identified and resolved.

The objectives of this effort are:

13A. to better define the elements of and degree of regional control available through an options arrangement by monitoring development of actual hydro-power options;

13B. to identify and resolve constraints to effectiveness of options (including limitations on effective "shelf-life" of resources on which options have been obtained) which result from federal and state agency regulation and under other statutes;

13C. to identify potential for effecting sales of resources outside the region to overcome the problem of limited resource shelf-life, and otherwise permit timely development of resources which might otherwise be lost to the region;

13D. to identify appropriate risk factors and uncertainties which prevent resource options from being considered "available," and

13E. determine the appropriate size of the inventory of options to provide appropriate planning insurance.

[10-19] Bonneville Actions

Bonneville shall:

13.1 Enter into a comprehensive process of cooperation with the four Northwest states in order to exchange information on energy resource and energy facility siting. The purpose of this arrangement will be to coordinate information about projected regional energy needs and the types of resources that will satisfy those needs. This exchange will lead to consistent federal and state policies regarding projected resource acquisitions with due deference to state siting constraints and considerations.

13.2 Create a state options task force with representatives of the four state (and in particular, any state siting authority), Bonneville customers, public interest groups, and the Council. The purpose of this task force will be to develop provisions for options in each state. For example, the State of Oregon Siting Council has proposed a method of banking sites for regional resources with the State of Oregon. Although a great many questions remain to be resolved, this proposal provides a significant step toward the successful coordination of an options process in the region such that the authority of the state Siting Council is fully recognized while providing the region with a reliable plan for meeting its needs for resources through the options concept.

13.3 Identify, by project, specific resources which may be lost to the region if decisions to acquire an option or to acquire the resources are not made. This inventory should recognize each resource sponsor's requirements for keeping the resource available to the region.

13.4 Explore opportunities for marketing power and for removal of constraints to marketing power outside the region which could facilitate development of some resources.

#### Council Actions

The Council will:

13.5 Establish a task force composed of representatives of the Council, Bonneville, utilities, and other interested parties to identify for each resource type: (1) each significant potential federal and state regulatory impediment to success of the options program; and (2) proposed means of resolving that uncertainty through informal understandings with the affected agencies, amendments to statutes or regulations, or other means.

13.6 Adopt criteria for determining when resources under options are sufficiently firm to be counted as "available" within the meaning of the Act.

13.7 Determine, with the assistance of other analyses to be conducted as part of this two-year plan: (1) the optimum size of the options inventory to permit development of an adequate supply of available resources; and (2) the appropriate timing for concluding option agreements to permit adequate flexibility in the preconstruction process.

13.8 Develop alternative planning approaches if options prove to be unworkable. These approaches would have to reexamine the appropriateness of planning to a high demand forecast. Other methods of obtaining resource flexibility and shorter lead times will also be explored.

#### 14. Hydropower

The objective of this program is to test the options concept by pursuing options for future hydropower development. The Council had concluded that hydropower is an important resource in this plan. In the high growth forecast up to 920 megawatts of hydropower would be needed and appear to be available at less than 4.0 cents per kilowatt-hour. The Council recognizes that modifications to regulatory processes may have to be made before hydropower can be treated as an option in the Council's planning strategy. Further, there is unresolved concern regarding the effects of hydropower development on fish and wildlife in the region. The Council's two-year actions address these concerns.

During this two-year action plan, Bonneville shall acquire an option on each of the following listed facilities only after a finding has been made that the construction and operation of each facility will have an insignificant adverse effect on fish and wildlife population and on habitat.

Such a finding may be made only after consultation among representatives of Bonneville, the U.S. Army Corps of Engineers, the Bureau of Reclamation, the Council, state and federal fish and wildlife agencies, Indian tribes, the region's utilities, and interested non-utility sponsors.

#### Bonneville Action

Bonneville shall:

14.1 Acquire options on the following six categories of hydropower facilities:

1. An existing dam, currently not generating electricity, with a capacity greater than 15 megawatts.

2. An existing dam, currently not generating electricity, with a capacity of between 5 and 15 megawatts.
3. A new facility with a capacity greater than 25 megawatts.
4. A new facility with a capacity between 10 and 15 megawatts.
5. A new facility with a capacity less than 10 megawatts.
6. A new facility with an exemption from the FERC licensing process.

In acquiring options on hydropower sites, Bonneville shall adhere to the provisions of Appendix E.

#### Council Actions

The Council will:

14.2 Design a study to identify and rank potential hydropower sites in the region. This study will include representatives from Bonneville, the U.S. Army Corps of Engineers, the Bureau of Reclamation, the [10-20] Council, state and federal fish and wildlife agencies, affected Indian tribes, the region's utilities, and interested non-utility resource sponsors. The organization of the study, specific tasks necessary to meet the study objectives and the funding sources will be determined after the adoption of the plan and in consultation with all of the parties identified above.



Potential hydropower sites will be ranked based on fish and wildlife concerns.

Category I. Sites at which the construction and operation of hydropower facilities will have insignificant adverse effects on fish and wildlife population and habitat.

Category II. Sites at which the construction and operation of hydropower facilities will have significant adverse effects on fish and wildlife populations and habitat, but may be reduced to an insignificant level by development and implementation of proven mitigation techniques.

Category III. Sites at which the construction and operation of hydropower facilities will have significant adverse effects on fish and wildlife populations and habitat which cannot be reduced satisfactorily because of the critical nature of the habitat or populations affected, the lack of proven mitigation techniques, expense and delay, or any other reason.

The study should be based on existing data, studies, and literature to the extent these are sufficient. The emphasis of the study should be to first identify sites within Categories I or II in order



to facilitate early commitment to those sites.

The term 'sites' has been used in a broad sense to cover both specific sites and stream reaches. Although the comprehensive study might take two years or more, a progress report will be made to the Council on specific sites currently in the FERC licensing process by January 1985. This information will be used in the next revision of this plan, scheduled for adoption in November, 1985. This study shall be coordinated with other studies being done under the Council's fish and wildlife program and with the Council's efforts to refine current hydropower data bases.

14.3 Continue in its efforts to refine the data base on existing and potential hydropower sites that are environmentally sound and cost-effective. The Council will coordinate this effort

closely with the hydropower ranking study discussed above.

15. Market Interruptible Energy  
In the Northwest

The objective of this program is to develop additional markets for interruptible energy in the Northwest. The effort to develop additional means of retaining the economic benefits of low-cost non-firm energy in the region is the most important energy-related economic issue over which the region has control, and it should be treated accordingly.

Bonneville Actions

Bonneville shall:

15.1 Initiate a policy to develop, to the fullest extent possible, regional markets for non-firm energy including industrial, commercial, and irrigation markets.

15.2 Set an initial goal of 900 to 1,400 megawatts of potential interruptible load in the industrial sector and conduct further investigations to determine whether more potential is available.

Council Action

The Council will:

15.3 Study whether the region should develop Northwest markets for conversion of existing firm loads to interruptible status. Such loads might include the second quartile of DSI power, some industrial loads of utilities, and

certain irrigation loads. Bonneville could purchase the right to interrupt the load during a particular low-water event. In the case of irrigation loads, farmers could decide to use cheaper interruptible power to serve a portion of their existing firm loads. The interruptibility would be gained solely through voluntary contractual arrangements between Bonneville and the customer or utility and would not be a condition of service for any customer. This study will be done in consultation with Bonneville.

16. Sale of Firm Surplus Energy to the Southwest

Bonneville and other regional utilities are engaged in an effort to market the current firm surplus to the Southwest. The Council supports these efforts. The proposed sale of the region's firm surplus is entirely consistent with efforts to market interruptible energy within the region. Neither effort is a substitute of the other.

Council Action

The Council will:

16.1 Open discussions with the California Energy Commission regarding a

sale of firm surplus power. The Council intends to consult with Northwest utilities and Bonneville as part of this process. The Council recognizes the potential benefits to both Northwest and Southwest and is prepared to use its regional power planning authority to encourage a sales agreement that benefits both regions.

#### 17. Geothermal

The Council has concluded that a large geothermal potential exists in the region for both electric generation and direct applications that decrease the need for electricity. (Direct applications of geothermal and other renewable resources are considered in chapter 7, Conservation.) However, the precise size, characteristics, and technical potential of the geothermal resources has not been determined. The objective of this program is to encourage confirmation of the region's geothermal resource for electric generation so it can be developed quickly when the need exists. The following actions are expected to provide a base for including geothermal resources in future plans.

Bonneville Action

Bonneville shall:

17.1 Develop and implement a geothermal demonstration program that guarantees the purchase of electricity from the first 10 average megawatts generated at the most promising environmentally acceptable geothermal [10-21] site available in the region. The site should be estimated to be able to produce at a capacity of 100 megawatts or more over a 30-year period. There should be a clear agreement that if the field is developed it would be available to the region at competitive prices. The fixed purchase price should be tied to the cost to Bonneville of the energy from a new coal plant. Recognizing the demonstration nature of this venture, Bonneville should be prepared to pay a price up to 50 percent higher than the cost of energy from a new coal plant at the time of acquisition. If this program proves workable, and as need dictates, the Council will consider expanding this program to other promising sites in the region.

18. Wind

The objective of this program is to continue to assess the potential of wind resources, without investing in additional wind generation, so that this resource can be included in the plan when it becomes cost-effective. The action

item listed below should not affect Bonneville's current efforts related to the wind resource assessment and development.

### Bonneville Action

Bonneville shall:

18.1 Conduct a study of the cost and expected operating efficiency of wind generators using existing and potential wind demonstration projects. The Council is interested in determining the feasibility and cost-effectiveness of including 50 average megawatts in the next revision of the plan. The Council will be assisted in making this determination through the continued efforts of Bonneville in collecting and assessing data from existing demonstration projects. Bonneville's proposed feasibility studies of wind generators on the region's coast will also assist the Council in making this determination.

### 19. Combustion Turbines

The objective of this program is to study potential obstacles to the construction and operation of combustion turbines and to develop methods for overcoming those obstacles. Although the Power Plant and Industrial Fuel Use Act generally prohibits use of oil and natural gas in

new power plants, it does provide for specific types of exemptions. Preliminary Council research suggests that one or more of these exemptions may be available for combustion turbines that are needed to meet unanticipated load growth and operate to "firm" hydropower. The most likely exemptions are those for:

- Peak loading;

- Cogeneration;

- Maintaining reliability of service;

- Lack of an alternate fuel at a cost not substantially exceeding that of imported oil; and

- Fuel mixtures involving alternate fuels.

State siting requirements present other potential regulatory hurdles that need to be investigated. Combustion turbines may need to be sited close to existing gas or oil pipelines, for example. Also, the Council needs to know how much energy existing combustion turbines can provide. The following



actions will assist the Council in planning to use combustion turbines as a hedge against unexpected demand growth in the higher growth forecasts.

#### Bonneville Action

Bonneville shall:

19.1 Acquire an existing natural gas combustion turbine and petition the U.S. Department of Energy for an exemption under the provisions of the Fuel Use Act to allow use of the combustion turbine as described in chapter 5.

#### Council Actions

The Council will:

19.2 Study the likelihood of obtaining further exemptions under the Fuel Use Act for combustion turbines used pursuant to the Council's resource portfolio. If necessary, the Council may request from the Department of Energy formal interpretations of the exemptions as they would apply to specific combustion turbine proposals.

19.3 Study regulatory requirements, including state siting standards, that would apply to new combustion turbines.

19.4 Study the potential contribution of existing combustion turbines and evaluate the effect of the Fuel Use Act on their use.

19.5 Study the cost-effectiveness of combustion turbines as a resource for making use of the non-firm energy from the hydropower system.

19.6 Study and evaluate the impact of Bonneville's forthcoming displacement policy on the operation of combustion turbines and service to meet top quartile loads of the Direct Service Industries.

Based on the results of these studies, the Council will re-evaluate the role of combustion turbines in the resource portfolio and make changes as necessary in future revisions of the plan.

## 20. Cogeneration

The cogeneration included in the high growth forecast is not needed to serve regional loads until 1993. Nevertheless, the Council recognized the potential contribution of cogeneration to the region's power system and has decided that early actions by Bonneville are necessary to preserve the option of cogeneration in the mid-1990's. The objective of this program is to preserve

cogeneration opportunities that are available before they are needed in the region.

The Council recognizes that the Federal Power Act and the Public Utility Regulatory Policies Act affects much of the development of cogeneration in the Northwest. The Council will work with appropriate agencies, Bonneville, utilities, and resource developers to coordinate activities under those statutes with the provisions of this plan.

#### Bonneville Actions

Bonneville shall:

20.1 Assist potential cogenerators in obtaining access to tielines which will enable them to market cogenerated electricity not currently needed by the region. Once tieline access is obtained, Bonneville should [10-22] find ways to use the region's non-firm energy to displace cogenerated power. When non-firm energy is being sold for less than the cogenerator's variable operating cost, the cogenerator could substitute this energy for cogenerated power for sale to the

tieline. The lower cost to the cogenerator could be reflected in a shared-savings price to the purchaser. Appropriate call-back provisions should be made by the cogenerator so that the region has access to the power when needed.

20.2 Assist potential cogenerators in their efforts to market cogenerated electricity in the region.

20.3 Develop a program for acquiring options that will assist potential cogenerators, when making regular scheduled plant modifications, to make appropriate investments that will permit addition of generating equipment at a later date. (An example would be replacing a worn-out low-pressure boiler with a high-pressure boiler.) This program should be ready to be implemented by the next revision of this plan.

21. Solar Generation and Advanced Thermal Technologies

New technologies will emerge that are not currently being counted on to provide firm energy. The region should be alert to any potential for new, cost-effective resources. The Council recommends that Bonneville keep abreast of emerging technologies, specifically solar. The Council andd Bonneville should follow

closely the solar demonstration projects that are currently underway in California.

Bonneville Action

Bonneville shall:

21.1 Work to improve the data base on solar insolation in the Northwest both on a broad basis and at specific promising sites.

22. Biomass

The objective of this program is to continue the Pacific Northwest Regional Bioconversion Program as presently administered by Bonneville to better develop data depicting the industrial and residential end use of biomass.

Bonneville Action

Bonneville, in consultation with the Council and the Pacific Northwest Bioconversion Policy Group, shall:

22.1 Continue the Pacific Northwest Regional Bioconversion Program as it is now described and funded by the U.S. Department of Energy.

23. Large Thermal Plants

Large thermal plants require from 10 to 15 years of lead time before they

can produce power. Partly for this reason and because of the related risks inherent in beginning a long-lead-time plant, the Council has not included large thermal plants in the twenty-year plan except in the medium-high and high growth forecasts in the late 1990's. Should the Council's conservation programs not achieve the expected penetration or should the Council's options concept prove not to be effective, the region may have to rely on large coal and nuclear plants in the future. To prepare the region for this possibility, Bonneville, in cooperation with regional utilities, must undertake studies of methods to decrease the construction time of large thermal plants.

#### Council Action

The Council will:

23.1 Conduct a study, in cooperation with Bonneville, the region's public and private utilities, EPRI, representatives from architectural and engineering firms, and equipment manufacturers, to determine

whether and how the planning and construction schedules of large thermal plants can be reduced.

24. Method for Determining Environmental Costs and Benefits

The Act requires that this plan include, "in such detail as the Council determines to be appropriate," a method for determining quantifiable (measurable) environmental costs and benefits. Those costs and benefits will then be used to determine the cost-effectiveness of various resources. Environmental costs and benefits that cannot be measured must be identified and given due consideration. The Council's method for determining quantifiable environmental costs and benefits is contained in Appendix C.

Bonneville Actions

Bonneville shall:

24.1 Prepare to implement the Council's method and be prepared to make full use of it for any contemplated resource acquisition.

24.2 Continue efforts to identify and create data bases and undertake



studies that contribute to a better understanding of environmental costs and benefits and the techniques which may be used to evaluate them. Efforts should be aimed at improving the utility of the method as a planning tool and as a tool for evaluating specific resources. The method and the results of any studies should be used to evaluate any resource Bonneville proposes to acquire.

25. Method for Calculating Surcharges

The Act requires the Council to provide a method in the plan which the Administrator shall use in imposing surcharges. The Council's method for calculating surcharges is presented in Appendix D.

The Council recommends surcharges for the following model conservation standards:

Model Standards for new residential buildings, Action 2;

Model Standards for new non-residential buildings, Action 3;

Model Standards for conversion to electric space heat in residential buildings, Action 6; and

Model Standards for conversion to electric space conditioning in

non-residential buildings, Action  
7.

[10-23] Surcharges must be calculated in accordance with the method provided in Appendix D.

The conservation standards must be adopted and enforced by January 1, 1986. Thereafter, utilities will be expected to achieve the energy savings obtainable through these standards or to demonstrate, through adoption of other conservation measures (including rate design), that equivalent savings have been accomplished.

ADDITIONAL COUNCIL ACTIONS DURING THE  
NEXT TWO YEARS

It is important that the Council be kept aware of how this plan is being implemented and how the region's energy future is unfolding. Without this process the Council would be unable to respond to changing conditions.

The Council has developed a program to monitor implementation of the plan and to evaluate the plan's continuing suitability for the region's energy future. With this information, the Council can take corrective actions quickly.

Significant improvements to the region's energy planning capability have been accomplished over the last two years through the use of models developed by the region's utilities and the Council. It is prudent for the Council to improve energy planning skills, methods, and models so that the Council's planning activities are of the highest possible quality. The Council has identified special studies, enhancements to existing models, and the development of newer, more comprehensive energy planning techniques centered around the growth forecasting model, the system analysis model, and the strategic planning model.

The Council will continue to seek active public involvement in all these activities.

During the next two years, Council activities will occur in the following areas:

26. Monitoring

A major objective of the Council in developing the plan was to deal effectively with the obvious uncertainties facing the region. As a result, the plan is much more than just a document to be placed on a shelf; it establishes a continuing and adaptive process. Therefore, a crucial Council function will be to monitor any changes in the conditions and assumptions on which the plan depends, and Bonneville's implementation of the plan. This is important for two reasons: (1) to ensure that Bonneville's actions reflect the intent of the plan; and (2) to ensure that implementation of the plan is

adaptive to changing circumstances and new information, while still adhering to the basic principles and objectives of the plan. A more detailed summary of the Council's program to monitor and evaluate progress is presented in Appendix A.

## 27. Demand Forecasting

27.1 Coordination of Load Forecasting Activities. The Council will continue to work toward a goal of coordinated demand forecasting activities, among Bonneville, PNUCC, the Council and other involved parties. There are significant opportunities for agreement on models, data, and basic assumptions, thereby eliminating unnecessary duplication of effort and achieving a common basis of understanding. The cooperative efforts in developing the demand models and forecasts for the plan were an excellent start toward this goal.

27.2 Economic Forecasting Model. The method by which forecasts of economic and demographic data are developed should be improved. The current model is not capable of capturing the complex interaction between industries within the region, between economic and population changes, and between regional and national economic changes. Bonneville has contracted to develop a regional economic model which would incorporate these interactions. The Council will monitor progress on model development so that this model can be used to develop Council forecasts in the future.

27.3 Industrial and Irrigation Forecasting Model. The Council will improve demand forecasting models in the irrigation and industrial forecasting sectors.

27.4 Demand Model Validation. An important area for the Council is the continued testing and evaluation of the demand models based on the latest demand data and conservation experience in the region. Such testing of the models will lead to the identification of areas where the models can be improved or the underlying data can be refined. In addition to models used for the plan, an alternative residential demand model will be evaluated which was developed by the Council.

27.5 Short-Term Forecasting. Although the Council's forecasting and planning activities are primarily concerned with the long-term forecasts, monitoring of the plan requires an understanding of short-term developments that affect the long-term forecasts used in the plan. The Council will become involved in the short-term forecasting activities of Bonneville, PNUCC, and others in the region and will intergrate those activities into the monitoring of the plan. If necessary, the Council will develop its own short-term analysis capability to supplement the available information and to ensure an adequate monitoring program. The Council's goal is to have maximum involvement of interested parties, and to ensure coordination of short-term forecasting activities in the region as they relate to the monitoring activity.

27.6 Residential Electricity Use Survey Data. Bonneville has been developing plans for a new survey of residential

use of electricity. This would be a follow-up on the survey that forms much of the data base for the Council's residential demand models. The Council has been participating actively in Bonneville's survey planning and expects to continue such consultation. New data, when available, will be used to update and refine the residential models and to reassess conservation actions that have taken place since the previous survey in 1979.

## 28. Conservation and Resources

28.1 Conservation and Resources Data Development. On a continuing basis, the Council will seek additional and better information related to all resources in the Council's data base. In the near future, this effort will concentrate on improving the quality of the Council's hydropower data.

[10-24] In FY84 and FY85, a broad effort will be made to improve the Council's data base. Attention will be focused on specific resources as required. Emerging technologies such as wind, solar, and geothermal will be closely monitored.

## 29. System Reliability and Rates

29.1 Decision Analysis Model. The concept of risk analysis is a key element in the Council's planning philosophy. Decisions on resource mix, value of shorter resource lead times, appropriate levels of resource options, and the timing of options and resource acquisitions are all affected by the complex interaction of uncertain variables. While the planning models used by the staff in



development of the plan are excellent tools for some purposes, they fall short in the area of risk analysis. This is due primarily to the inability of the model to adjust resource decisions internally as events unfold. The Council recognizes the need for, and will develop, a tool which provides the ability to rapidly examine the results of resource and option strategies applied during the planning period.

29.2 System Analysis Model Enhancement. While the system analysis model played an important role in development of the plan, it is still a very new tool and will continue to evolve to meet the needs of users. The Council expects to continue to play both an advisory and an active role in further model development.

### 30. Special Studies

During the process of developing this plan, the Council discussed in public meetings a series of issue papers and decision memos on specific issues of importance. This process has been particularly effective in stimulating public involvement in the Council's energy planning, and will continue throughout the next two years.

30.1 Conditions for Resource Acquisition Other than Hydropower. Appendix E of this plan lays out certain

provisions that Bonneville must adhere to when acquiring hydropower resources. These provisions are included to protect fish and wildlife from adverse impacts. During the next two years, the Council will conduct a study to evaluate criteria for the acquisition of thermal plants.

30.2 Billing Credits. Bonneville is developing a billing credits policy which will be released after this plan is adopted. The Council will analyze the policy for conformance to the plan. Based upon that analysis, the Council may recommend modifications of the policy. The Council will continue to monitor and evaluate applications for billing credits to determine their effect upon the plan.

30.3 WPPSS Schedule and Costs. The plan assumes that the WPPSS No. 1, 2 and 3 plants will be completed on schedule and within current budget estimates and will contribute a large amount of power to the region's power supply. Changes from those assumptions could alter considerably the region's energy picture and necessitate modifications to the Council's plan. The Council will closely monitor the construction schedules and costs of all WPPSS plants, so that the region has early warning of potential problems.

30.4 DSI Loads. Recent changes in the world aluminum market and in Bonneville rates to Direct Service Industries (DSIs) have raised the question of the outlook for continued production by the aluminum industry and other DSI customers in the region. Because DSIs account for a large segment of electrical loads and Bonneville revenues, it is important for the Council to keep abreast

of change in the outlook for their future. The Council will review studies prepared by Bonneville, consultants, the DSIs, and other interested parties.

30.5 Rate Design Studies. The Council plans on studying alternative rate designs further to determine the potential for increasing the conservation penetration rates and maintaining actual conservation savings. These studies will be done in consultation with state public utility commissions, Bonneville, and public and private utilities in the region.

30.6 Additional Hydropower Flexibility. Current practice limits hydropower system flexibility to the amount of fall and winter drawdown that can be carried by the one-year critical streamflow level. The Council will explore the circumstances under which additional drawdown might be economically feasible.

30.7 Interruptible Power Markets. In a preliminary finding, the Council estimated a potential interruptible industrial electric boiler market of 900 to 1400 megawatts. The primary focus on this market study was the forest products industry. Because of the high expected availability of non-firm energy during the spring runoff, potential for serving additional, interruptible Northwest industrial loads exists. An additional, more detailed, study will be done by the Council.

30.8 Reserves and Reliability Analysis. The Council will continue to study the operating reliability of the region's power system, placing emphasis on

the most cost-effective method of providing power system reserves. The Council will expand this analysis to include the peak energy needs of the system by using a new version of the system analysis model that simulates the hourly power requirements of the regional system.

31. Public Information and Involvement

The Council will continue its commitment to an active public involvement and information program. The Council believes that, for the plan to be implemented effectively, the public, state and federal agencies, Indian tribes, state and local governments, utilities, and other interested parties must be active participants. In addition, the Council will undertake consumer education programs on energy conservation and will develop a process for active public participation in revisions to the plan. These activities are further described in Appendix A.

Megawatts

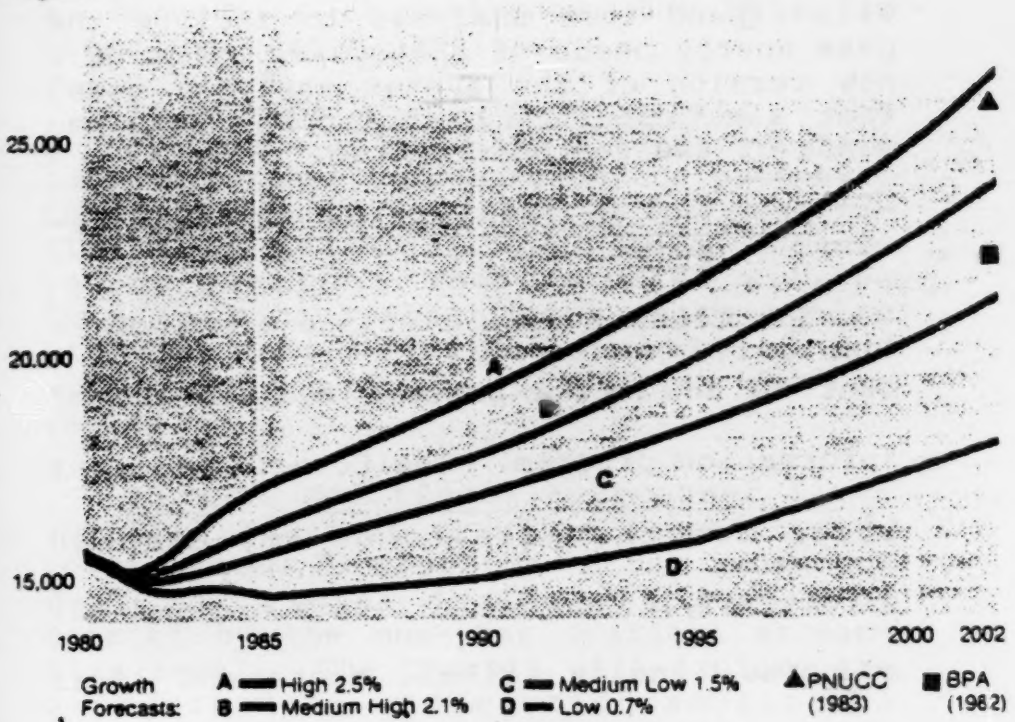


Figure 4-3.

Summary of Council's Demand Growth Forecasts

Table 4-1.

Forecast of Demand for Electricity and Price Projections

GROWTH FORECAST	DEMAND (Average Megawatts)		AVERAGE ANNUAL DEMAND GROWTH 1981-2002 (%)	INCREASE IN AVERAGE RETAIL PRICES ADJUSTED FOR INFLATION 1981-2002 (%)
	1981	2002		
High	15,524	26,245	2.5	80
Medium-High	15,524	23,797	2.1	50
Medium-Low	15,524	21,301	1.5	25
Low	15,524	17,834	0.7	5

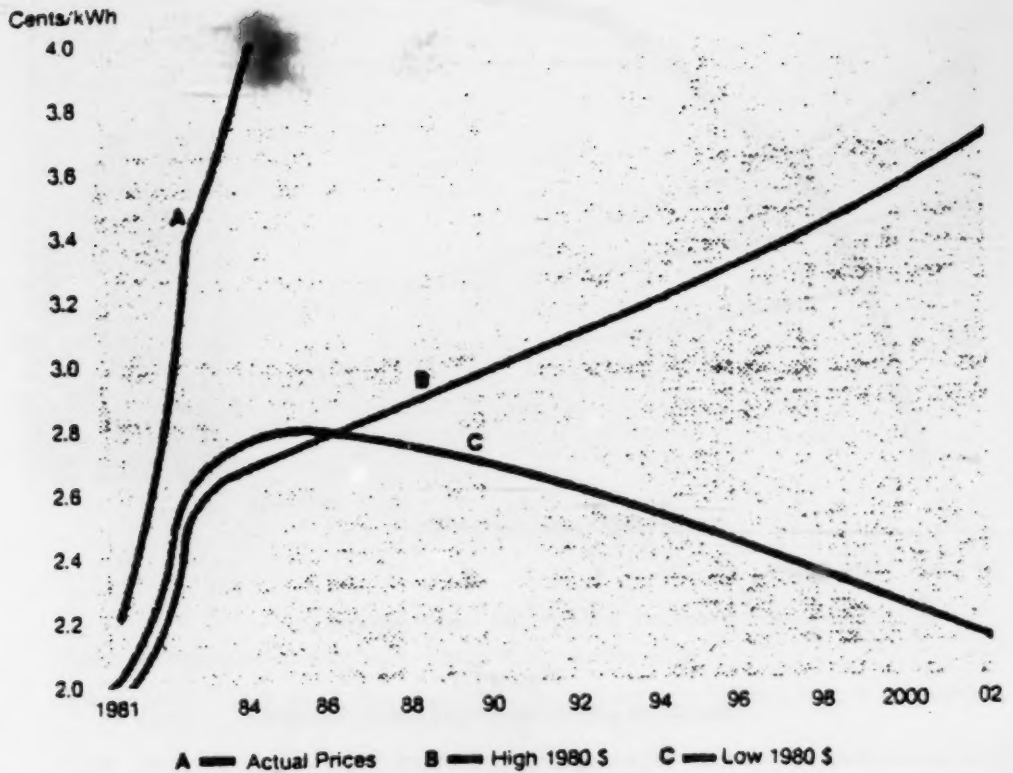


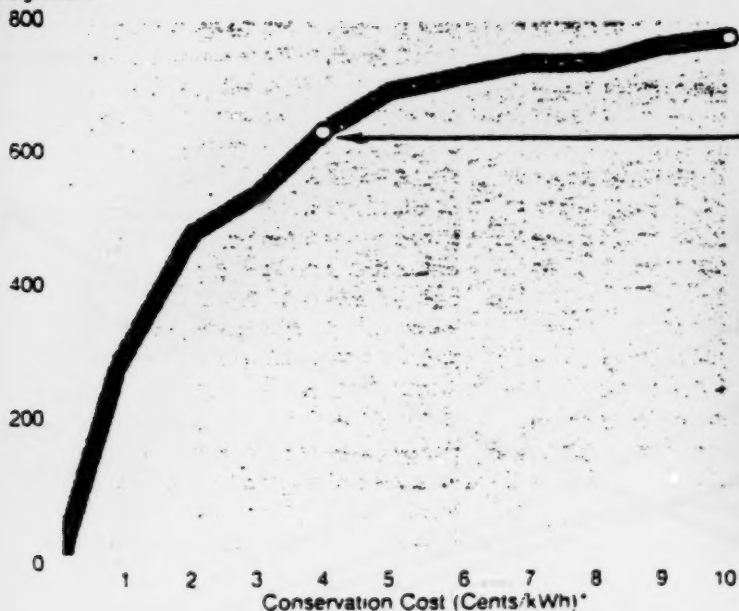
Figure 4-4.

Weighted Average Retail Prices, Adjusted for Inflation (1980 cents per kilowatt-hour)



Average  
Megawatts  
800

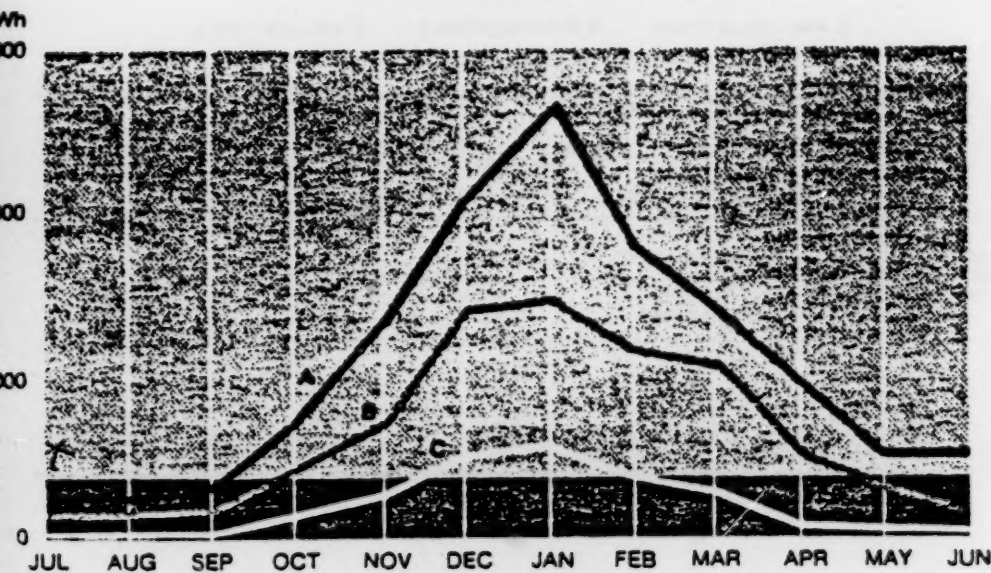
M-144



\*1980 Dollars

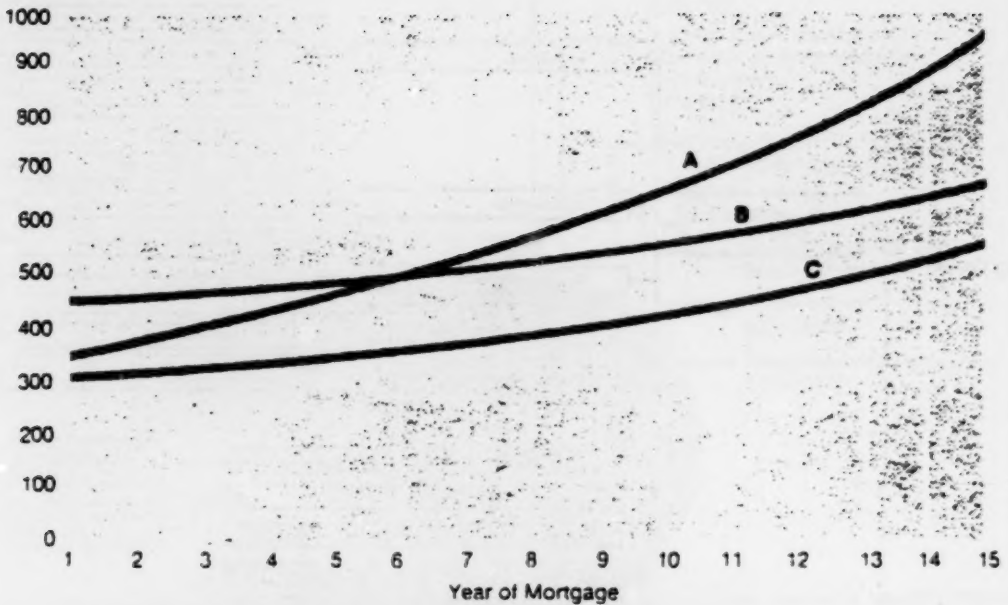
Potential not realized due to incomplete market penetration

**Figure 7-1.**  
*Residential Space Heating (Existing Houses)*



**Figure 7-2.**  
*Average Monthly Space Heating Use*



Annual Cost  
For Heating

- A — Annual space heating bill for house built to current code.
- B — Annual space heating bill, plus added mortgage cost for house built to model standard, before tax deductions and heating system size reduction.
- C — Annual space heating bill, plus added mortgage cost for house built to model standard after tax deduction and heating system size reduction.

Figure 7-3.

Annual Space Heating Cost for Houses Built to Current Code and Model Standard,  
Climate Zone 1 (example: Portland/Seattle)

NOTE: For houses built to current code, the annual cost shown is the consumer's electric bill for space heating. For houses built to the Council's standard, the annual cost shown is the consumer's electric bill for space heating, plus the increased mortgage payment needed to pay for the additional conservation measures installed in the house. In climate zones 2 and 3 a homeowner's combined payment (electricity plus mortgage) is less than his energy cost even before taxes and heating system cost savings are considered.

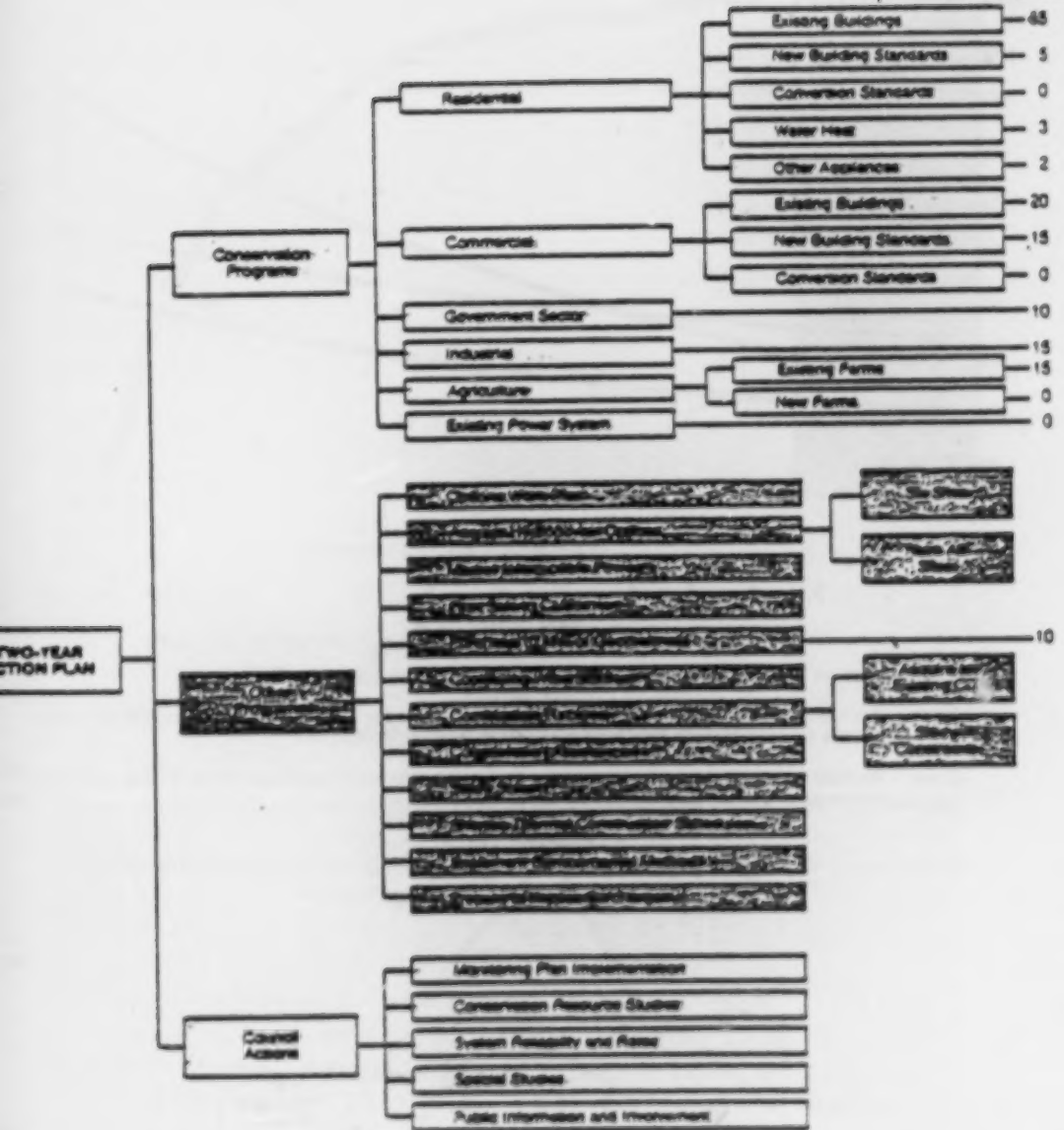
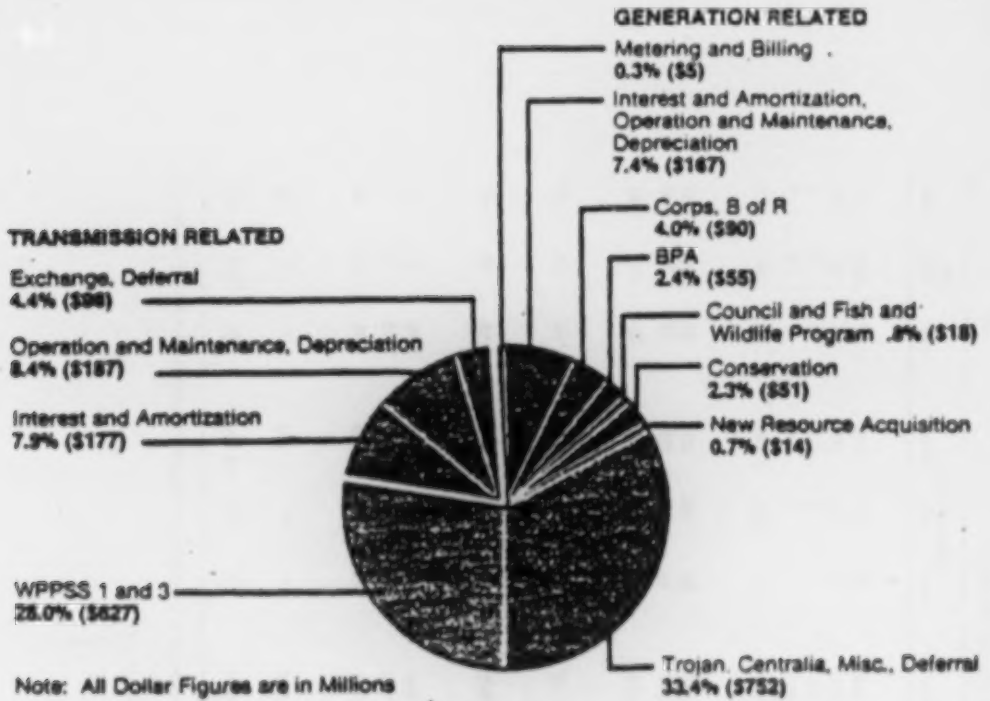
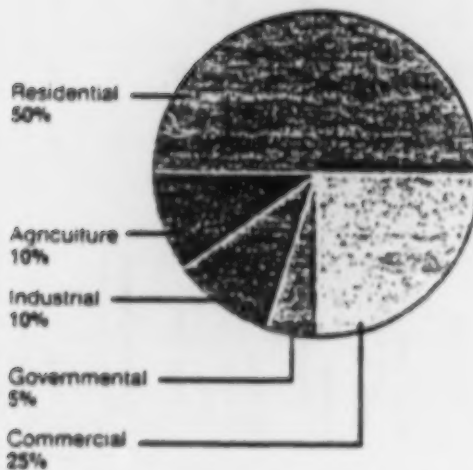


Figure 18-1.  
Summary of Two-Year Actions



**Figure 10-2.**  
Use of Bonneville Power Administration Revenues (FY 1983)



**Figure 10-3.**  
Conservation Savings—High Forecast

Table 10-1.  
Summary of Conservation Acquisition Plan by Forecast  
(Average Megawatts, Excludes of Line Losses)

SECTOR/END USE	1985	HIGH 1985	2005	1985	MEDIUM HIGH 1985	2005	1985	MEDIUM LOW 1985	2005	1985	LOW 1985	2005
<b>Residential</b>												
Existing Space Heating	65	180	520	65	180	440	65	180	475	65	180	160
New Space Heating	5	75	865	5	35	505	5	25	305	5	10	125
Water Heating	3	5	510	3	5	420	3	5	200	3	5	5
Other Appliances	2	5	355	2	5	280	2	5	200	2	5	5
Sector Total	75	245	2,340	75	205	1,625	75	195	1,180	75	180	295
<b>Commercial</b>												
Existing Structures	20	90	720	20	90	630	20	90	605	20	90	90
New Structures	15	50	615	15	45	370	15	35	230	15	30	140
Sector Total	35	140	1,335	35	135	1,000	35	125	835	35	110	230
<b>Governmental</b>												
Sector Total	10	15	15*	10	15	15*	10	15	15*	10	15	15*
<b>Industrial</b>												
Sector Total	15	45	545	15	45	545	15	45	545	15	45	45
<b>Agricultural</b>												
Existing	15	25	300	15	25	300	15	25	300	15	25	25
New	0	0	85	0	0	85	0	0	85	0	0	0
Sector Total	15	25	385	15	25	385	15	25	385	15	25	25
<b>Existing Power System Efficiency Improvements</b>												
	"	"	270	"	"	270	"	"	270	"	"	40
<b>TOTAL</b>	150	480	4,760	150	425	3,840	150	415	3,230	150	365	650

\*Twenty-year target will be revised based on Council's assessments of conservation potential in this sector scheduled for completion during the next two years.

\*Two- and five-year targets have not been established for power system efficiency improvements.



86-629  
No. \_\_\_\_\_

3

Supreme Court, U.S.  
FILED

OCT 6 1986

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
Supreme Court of the United States

October Term, 1986

SEATTLE MASTER BUILDERS ASSOCIATION, et al.,  
*Petitioners,*

v.

PACIFIC NORTHWEST ELECTRIC POWER  
AND CONSERVATION PLANNING COUNCIL,  
*Respondent,*

UNITED STATES OF AMERICA,  
*Intervenor-Respondent.*

APPENDICES N THROUGH X (VOL. 2 OF 2) TO  
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOHN W. HEMPELMANN  
*Counsel of Record, and*

PAUL SIKORA  
MICHAEL B. KING  
DIAMOND & SYLVESTER  
2600 Columbia Center  
701 Fifth Avenue  
Seattle, Washington 98104-7088  
(206) 623-1330  
*Attorneys for Petitioner*

148 p





# APPENDIX N

## 1983 NORTHWEST CONSERVATION AND ELECTRIC POWER PLAN VOLUME II

Adopted Pursuant to the Pacific Northwest  
Electric Power Planning and Conservation  
Act of 1980 (P.L. 96-501)  
April 27, 1983

Table J6-1a.  
Alternative Component Packages for Climate Zone 1—4,600 to 6,000 Heating Degree Days at 65 °F  
Single-Family Dwellings (R-3 Occupancy)

Component	Package				
	A	B	C	D	E
Building Envelope	Well Insulated	Low Infiltration	Sun Tempered	Passive Solar	Heat Pump
Insulation Minimums					
Ceiling	R-38	R-38	R-38	R-30	R-30
Wall	R-27	R-19	R-25	R-19	R-19
Slab Floor Perimeter	R-10	R-10	R-10	R-10	R-6.35
Floor Over Unconditioned Space	R-19	R-30	R-19	R-19	R-19
Exterior Doors (DISI No.)	2.0	2.0	2.0	2.0	6.5
(EDII No.)	—	—	—	—	6.5
Glazing					
Maximum U Value	.37	.37	.47	.47	.47
Maximum Total Area <sup>1</sup>	15%	15%	15%	No Requirement	No Requirement
Minimum Effective Solar Glazing Area <sup>2</sup>	No Requirement	No Requirement	8%	10%	No Requirement
Thermal Mass <sup>3</sup>	Not Required	Not Required	Not Required	Required	Not Required
Space Conditioning System					
Heating System Type	No Special Requirement	No Special Requirement	No Special Requirement	No Special Requirement	High-Performance Heat Pump (S.P.F. = 2.0) <sup>4</sup>
Infiltration Control Package (See table J6-3)	A	A	A	B	A

<sup>1</sup>Percent of conditioned floor area. <sup>2</sup>See Section 601C for calculation.

<sup>3</sup>See Section 601B for calculation. <sup>4</sup>See Equation 7 for calculation.

Table J6-1b.  
Alternative Component Packages for Climate Zone 2—6,001 to 8,000 Heating Degree Days at 65 °F  
Single-Family Dwellings (R-3 Occupancy)

Component	Package			
	A Wall Insulated	B Sun Tempered	C Passive Solar	D Heat Pump
Building Envelope				
Insulation Minimums				
Ceiling	R-38	R-38	R-38	R-38
Wall	R-31	R-25	R-25	R-19
Slab Floor Perimeter	R-12	R-12	R-12	R-12
Floor Over Unconditioned Space	R-30	R-30	R-19	R-19
Exterior Doors (DISI No.)	2.0	2.0	2.0	6.5
(EDII No.)	—	—	—	6.5
Glazing				
Maximum U Value	.37	.37	.37	.47
Maximum Total Area <sup>1</sup>	15%	15%	15%	No Requirement
Minimum Effective Solar Glazing Area <sup>2</sup>	No Requirement	8%	10%	No Requirement
Thermal Mass <sup>3</sup>	Not Required	Not Required	Required	Not Required
Space Conditioning System				
Heating System Type	No Special Requirement	No Special Requirement	No Special Requirement	High-Performance Heat Pump (S.P.F. = 2.0) <sup>4</sup>
Infiltration Control Package (See table J6-3)	B	B	B	A

<sup>1</sup>Percent of conditioned floor area. <sup>2</sup>See Section 601C for calculation.

<sup>3</sup>See Section 601B for calculation. <sup>4</sup>See Equation 7 for calculation.

Table J6-1c.  
Alternative Component Packages for Climate Zone 3—Over 8,000 Heating Degree Days at 65 °F  
Single-Family Dwellings (R-3 Occupancy)

Component	Package			
	A	B	C	D
Well Insulated		Sun Tempered	Passive Solar	Heat Pump
<b>Building Envelope</b>				
Insulation Minimums				
Ceiling	R-38	R-38	R-38	R-38
Wall	R-31	R-25	R-25	R-19
Slab Floor Perimeter	R-15	R-15	R-15	R-15
Floor Over Unconditioned Space	R-30	R-30	R-19	R-19
Exterior Doors (DISI No.)	2.0	2.0	2.0	6.5
(EDII No.)	—	—	—	6.5
<b>Glazing</b>				
Maximum U Value	.37	.37	.37	.47
Maximum Total Area <sup>1</sup>	15%	15%	No Requirement	No Requirement
Minimum Effective Solar Glazing Area <sup>2</sup>	No Requirement	8%	10%	No Requirement
Thermal Mass <sup>3</sup>	Not Required	Not Required	Required	Not Required
<b>Space Conditioning System</b>				
Heating System Type	No Special Requirement	No Special Requirement	No Special Requirement	High-Performance Heat Pump (S.P.F. = 2.0) <sup>4</sup>
<b>Infiltration Control Package</b>				
(See table J6-3)	B	B	B	A

<sup>1</sup>Percent of conditioned floor area

<sup>2</sup>See Section 601B for calculation.

<sup>3</sup>See Section 601C for calculation.

<sup>4</sup>See Equation 7 for calculation.

Table J6-1d.

**Alternative Component Packages for Multi-Family (R-1 Occupancy) Dwellings and  
Other Occupancies up to 5,000 Square Feet**

Component	Climate Zones		
	1	2	3
	4,000-6,000 Heating Degree Days	6,001-8,000 Heating Degree Days	Over 8,000 Heating Degree Days
Building Envelope			
Insulation Minimums			
Ceiling	R-30	R-30	R-30
Wall	R-19	R-25	R-25
Slab Floor Perimeter	R-10	R-15	R-15
Floor Over Unconditioned Space	R-19	R-30	R-30
Exterior Doors (DISI No.)	2.0	2.0	2.0
Glazing			
Maximum U Value	.47	.47	.47
Maximum Total Area <sup>1</sup>	15%	15%	15%
Infiltration Control Package (See table J6-3)	B	B	B

<sup>1</sup>Percent of conditioned floor area.

Table J6-2.

**Minimum Thermal Mass Requirements**

Solar Glazing as a Percent of Conditioned Floor Area	Minimum Heat Storage Capacity Requirements Btu/°F/sq ft of Solar Glazing <sup>1</sup>
0-8	No Requirement
9-14	30
Over 15	45

<sup>1</sup>Calculated using Equation 6, chapter 4.

Step. 1. Identify Thermal Efficiency Levels in New Housing. The Council assumed that new residential buildings were being constructed in compliance with current building codes. In those areas which have not adopted mandatory energy conservation codes for new buildings, the Council attempted to identify "current practice." The principal data sources for this latter procedure were discussions with home builders and an annual survey of new housing characteristics conducted for Bonneville. Table K-14 summarizes the Council's assumptions regarding the level of thermal efficiency present in new residential buildings.

Step 2. Estimate Cost and Potential Savings for Thermal Efficiency Improvements in New Dwellings. Tables K-15 through K-17 show the Council's estimate of the cost and savings available through

improved thermal efficiency in new residential buildings on a measure-by-measure basis. The cost estimates are given in 1980 dollars. The savings estimates are based on the Sunday computer simulation of the annual space heating energy use of new dwellings assuming no wood heating and an average 24-hour per day thermostat setting of 65°F. Waste heat given off by lights, appliances, and occupants was assumed to provide 5,133 kWh/year of "free heat."

Step 3. Compare Projected Cost and Energy Savings with Observed Cost and Savings in New Energy-Efficient Buildings. The Council compared the simulated energy use for new buildings to metered energy use in energy-efficient houses in the Northwest. For a sample of 39 energy-efficient houses, the Council's projected annual use for space heating was 2.7 kilowatt-hours per square foot per

year. The average actual use of this sample was 2.8 kilowatts per square foot per year - a difference of less than 4 percent.

Step 4. Develop Conservation Supply Functions. The potential for conservation in new dwellings is directly related to the number of new dwellings built. Under the Council's high economic and demographic forecast, it is projected that approximately 2.327 million new electrically heated housing units will be built between 1986 and 2002. Of these, 71 percent (1.666 million) are expected to be single-family units, 17 percent (393,000) multi-family units, and 12 percent (268,000) mobile homes. To estimate the technical potential for conservation in new dwelling units the Council multiplied the savings shown in tables K-15 through K-17 per unit for individual measure times number of those units projected to be



built. Table K-18 summarizes the results of this process.

Step 5. Estimate Realizable Conservation Potential. The Council's estimate of realizable potential for conservation savings in new residential buildings is based on the implementation of its proposed model efficiency standard. The adoption of this standard would reduce the projected regional average energy use per unit in the 2002 from an estimated 6,896 kilowatt-hours per unit to 2,967 kilowatt-hours per unit. If 100 percent of the 2.327 million electrically heated buildings built between 1986 and 2002 complied with this standard, the region would save 1,044 megawatts  $(2.327 \text{ million units} \times 6,896 \text{ kWh/unit} - 2,967 \text{ kWh/unit} \times 2.327 \text{ million units})$ . The Council's plan anticipates that 90 percent of the new units built will comply with its proposed standard. Therefore, the projected 1,044 megawatts

of savings from this standard were "discounted" for less than complete compliance, reducing the expected savings to 940 megawatts. The Council's plan captures 880 megawatts of these savings as a resource. The remaining 60 megawatts are assumed to be "retained" by consumers in the form of increased amenity levels (e.g., warmer houses). The distribution of the savings expected from the Council model standard for new dwellings by state is approximately as follows: Washington - 420 megawatts, Oregon - 300 megawatts, Idaho - 130 megawatts, and Western Montana - 30 megawatts.

Table K-14.  
New Residential Construction Base Case Efficiency Levels and Annual Space Heating Use Assumptions

Building Type	Climate Zone					
	1		2		3	
	Insulation Level	Annual Use (kWh/sq ft)	Insulation Level	Annual Use (kWh/sq ft)	Insulation Level	Annual Use (kWh/sq ft)
Single-Family						
Ceiling/Roof	R-30	5.5	R-30	8.9	R-38	9.0
Walls	R-11		R-11		R-11	
Underfloor	R-11/19		R-11/19		R-11/19	
Windows	Double glazed*		Double glazed*		Double glazed	
Multi-Family						
Ceiling/Roof	R-30	3.4	R-30	6.0	R-30	7.2
Walls	R-11		R-11		R-11	
Underfloor	R-11/19		R-11/19		R-11/19	
Windows	Double glazed		Double glazed		Double glazed	
Mobile Homes						
Ceiling/Roof	R-19	6.5	R-19	10.0	R-19	13.0
Walls	R-11		R-11		R-11	
Underfloor	R-11		R-11		R-11	
Windows	Double glazed*		Double glazed*		Double glazed	
Weighted Average Use (kWh/sq ft)						6.8
						4.3
						8.6

Table K-15.  
Technical Potential for Energy Conservation in New Single-Family Buildings

Resource Description	Unit Cost 1980\$	Life Years	Climate Zone		
			1 Energy (kWh/unit)	2 Energy (kWh/unit)	3 Energy (kWh/unit)
Insulate Roof					
R19 to R30	176	30	729	1,097	1,266
R30 to R38	137	30	239	363	427
R38 to R49	176	30	156	262	313
R49 to R60	176	30	106	179	215
Infiltration					
6-4	381	30	1,096	1,650	1,927
4-2	635	30	941	1,471	1,745
Insulate Floors					
R11 to R19	200	30	422	637	750
R19 to R30	301	30	290	480	571
R30 to R42	652	30	171	312	360
Insulate Glass					
1-2	302	30	2,046	3,005	3,499
2-3	346	30	594	875	1,046
3-4	465	30	200	347	419
2-3 (Casement/awnings)	631	30	584	875	1,046
Insulate Walls					
R11 to R19	396	30	860	1,284	1,480
R19 to R27	382	30	365	554	653
R27 to R31	150	30	127	190	229
R31 to R38	569	30	72	136	168
Doors					
R2 to R13	87	30	474	702	814



## APPENDIX O

### 1983 NORTHWEST CONSERVATION AND ELECTRIC POWER PLAN VOLUME IV

Adopted Pursuant to the Pacific Northwest  
Electric Power Planning and Conservation  
Act of 1980 (P.L. 96-501)  
April 27, 1983

. . . .

#### [112] "APPENDIX J" CONSERVATION STANDARDS FOR NEW RESIDENTIAL AND NON-RESIDENTIAL BUILDINGS

. . . .

Economic Feasibility For New Residential Buildings. Several homebuilders organizations and building material suppliers questioned the economic feasibility of the Council's model standard for new residential structures. They asserted that the use of triple pane windows and high R-value (in excess of R-19) walls was neither cost-effective to the region nor economically feasible for consumers.

Other groups, including NRDC, several individual homebuilders, and MDNRC supported the Council's standard as cost-effective and economically feasible.

RESPONSE: The Council analyzed the cost-effectiveness of triple pane and high R-value walls to the region. Triple pane windows in climate zone 1 could cost up to \$9.54/per square foot (in 1982 dollars) of window area and [113] remain cost-effective to the region. This cost assumes that these windows are replacing non-thermal break aluminum framed double pane windows. The actual cost to consumers of making this alteration in new construction based on a review of cost provided by five regional homebuilders and three other sources representing 41 window suppliers ranged from \$3.09/per square foot to \$9.43/per square foot of window area. All of these costs fall within the cost-effectiveness limit. In addition, both the



average (\$5.10/per square foot) and the median (\$4.60/per square foot) cost estimates represent regional resources that could be acquired for less than 25 mills/per kilowatt hour (1982 dollars).

The cost-effectiveness of the high R-value walls was also analyzed by the Council. Based on a survey of 8 sources and 14 builders, the cost to consumers of obtaining an R-27 wall versus an R-11 wall ranged from \$.59/per square foot of gross wall area to \$1.37/per square foot of gross wall area. The average cost was \$.76/per square foot and the median was \$.57/per square foot. Both the mean and the median cost represent resources costing less than 40 mills/per kilowatt-hour (1982 dollars). The upper limit of regional cost-effectiveness in climate zone 1 is \$.94/per square foot (1982 dollars). See table 1.

The cost used in the Council's initial assessment of the "economic feasibility to consumers" of triple pane windows was \$3.05/per square foot of window area. The incremental cost of R-27 walls was originally estimated at \$.45/per square foot of wall area. The mean cost obtained through public comment was approximately 68 percent higher for both of these measures. This fact, in addition to the revised base case assumptions regarding window characteristics and insulation levels, necessitated a review of the model standard's "economic feasibility to consumers." This review assumed the following:

- o Discount rate = 10 percent real
- o Mortgage rate = 6 percent real
- o Cost of electricity = 4¢/per kilowatt-hour
- o Electricity escalation rate = .5 percent per year real
- o Mortgage = 30 year, fixed rate

- o Downpayment = 10 percent
- o Builder overhead, fees and profit  
= 36 percent of hard cost.

The Council found that:

1. The life cycle cost to a consumer of complying with the Council's model standard for zone 1 is less than that for current codes at costs up to \$2.00 per square foot of floor area. The staff estimates the cost to consumers of complying with the zone 1 standard at between \$1.75-\$1.85/per square foot.

2. The life cycle cost to a consumer of complying with the Council's standard for zones 2 and 3 is lower than current codes for cost up to \$3.25/per square foot of floor area. The staff estimates of the cost of complying with the model standard at between \$2.50-\$2.75/per square foot for zone 2 and \$2.25-\$2.50 for zone 3.

3. The average cost of zone 1 standard (assuming \$1.85/per square foot) is

2.5 cents per kilowatt-hour.

[114] 4. The average cost of the zones 2 and 3 standard (assuming \$2.75/per square foot) is 2.2 cents per kilowatt-hour.

5. No prescriptive measure included in any zone exceeds a marginal levelized cost of 3.5 cents per kilowatt-hour.

The Council also conducted additional analysis to assess the sensitivity of the above findings to changes in input assumptions.

Based on the data submitted by builders and others, the Council's model standard for space heating in new residential structures appears to remain economically feasible and regionally cost-effective. The Council's final plan retains the same model standard for new residence as were included in the draft. However, it also includes a research and demonstration program to further test the stan-

dard's economics. Finally, although no change was made in the standard, several of the illustrative prescriptive paths depicted in appendix J of the draft plan were modified to reflect revised base case assumptions regarding current building practice and more refined performance analysis.

Commercial Lighting Standard. Numerous commenters indicated that the Council's commercial building standard was not aggressive enough. ASHRAE recommended that the lighting budget for retail stores be set at 1.5 watts/per square foot. NRDC recommended a reduction in all of the Council's commercial building lighting budgets. NRDC estimated that these standards would reduce commercial demand by 980 megawatts. This estimate was developed using the Council's Commercial Sector Forecasting Model.

RESPONSE: ASHRAE did not provide analytical support of its recommendation. NRDC provided a detailed technical analysis supporting the cost effectiveness and technical feasibility of its recommendations. The Council reviewed NRDC's proposed lighting standard and its affect on commercial building energy use. Analyses revealed that NRDC's proposal is based on accepted illuminating industry standards and available technology. However, the proposed standard is significantly more stringent than has been adopted by code anywhere in the country. The Council's lighting budget for retail stores was set at 1.5 watts/per square foot. NRDC's recommendation that the budget be set at 1.0 watts/per square foot was rejected because the Council felt it represented too dramatic a departure from current practice without further opportunity for public comment.

Commercial Building Performance Standards.

Several commenters recommended that the Council include a total performance standard for new commercial buildings.

RESPONSE: California is the only state which has developed total building energy budgets for commercial structures. However, the California budgets are less aggressive than the Council's model standard. The U.S. Department of Energy is expected to release its building Energy Performance Standards sometime this summer. Also, a more stringent version of ASHRAE's standard . . .





APPENDIX P

No. 83-7585

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEATTLE MASTER BUILDERS ASSOCIATION,  
et al.,

Petitioners,

v.

NORTHWEST POWER PLANNING COUNCIL,

Respondents,

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON PETITION FOR REVIEW FROM THE  
NORTHWEST POWER PLANNING COUNCIL

BRIEF FOR THE UNITED STATES AS INTERVENOR

OF COUNSEL:

HARVARD P. SPIGAL  
General Counsel  
JAMES O. LUCE  
Assistant General  
Counsel  
PAUL S. MAJKUT  
STEPHEN R LARSON  
PRESTON D. MICHIE  
MARYBETH VAN BUREN  
Attorneys  
Bonneville Power  
Adminsistration  
Portland, Oregon  
97208

RICHARD K. WILLARD  
Acting Assistant  
Attorney General  
PAUL BLANKENSTEIN  
ROBERT V. ZENER  
Attorneys,  
Appellate Staff  
Civil Divison,  
Room 3127  
Department of  
Justice  
Washington, DC  
20530  
Telephone:  
(202) 633-4027

. . . .

[12] II. OTHER PROVISIONS OF THE COUNCIL'S AUTHORITY, NOT INVOLVED IN THIS CASE, MAY RAISE DIFFICULT ISSUES UNDER THE APPOINTMENTS CLAUSE.

Summary

In addition to its authority to recommend model conservation standards and surcharges, the Council has several other authorities under the Act. Some of these authorities may be "significant" under the Buckley test. In the case of other provisions of the Act, whether they vest the Council with "significant authority" in the constitutional sense depends to a significant degree on issues of statutory interpretation. While the parties' briefs urge the Court to decide these issues in a manner that enhances the Council's authority, the Court should decline the invitation to interpret provisions of the statute not involved in the case, particularly since the provisions involved cannot

be meaningfully interpreted absent a more specific factual context.

The constitutional issues raised by the provisions of the Act that may vest the Council with significant authority are difficult.

On the one hand, the Appointments Clause clearly prohibits state appointment of federal officers; the Council's argument that the Clause prohibits only congressional appointment of federal officers has no merit. Moreover, while the Act provides that the Council shall not be considered a federal agency, 16 U.S.C. § 839b(a)(2)(A), since federal agencies are the only entities on which the Council may have authority to impose legal [13] obligations, the Council could be viewed as a federal rather than a state authority from a functional standpoint.

On the other hand, there are clearly some situations in which Congress may constitutionally require federal agencies to comply with state law and to obtain approvals from a state agency in connection with a federal project. A case like the present one--which pertains to a joint federal-state effort designed to solve a regional rather than a national problem--could be one of those situations.

A. Two Provisions of the Council's Authority May Be "Significant" In The Constitutional Sense.

There are two respects in which the Council may have authority to impose substantive restrictions on Bonneville, in a manner which meets the Buckley test of "significant" federal authority.

First, the Act establishes a limit on the amount of power that can be sold to direct-service industrial customers and

provides that, after the Council has adopted its conservation plan, the Bonneville Administrator may increase sales to these customers only after the increase is found by the Administrator and the Council to be consistent with the plan. 16 U.S.C. § 839(c)(d)(3).

Second, the Act requires Bonneville to obtain appropriation act approval to take certain actions relating to major resources if the Council determines these actions to be inconsistent with its plan. 16 U.S.C. § 839d(c)(3). Petitioners have argued that this may constitute a veto. [14] The parties also urge the Court to hold that other provisions of the Act vest the Council with significant authority over the actions of Bonneville. See Master Builders' Brief at 50; Pacific Legal Foundation Brief at 11-13. However,

these provisions raise unresolved issues of interpretation that would have a bearing on the determination of the respective responsibilities of the Council and Bonneville in a wide variety of settings. The Court does not have to reach those issues in this case; moreover, they are the type of issues that would be illuminated by specific factual contexts--and the facts of this case do not involve these provisions and thus do not present the factual background necessary for an informed interpretation. Indeed, we are hopeful that Bonneville (and other federal agencies) and the Council will continue to work together in an atmosphere of cooperation and accommodation that will render unnecessary the resolution of legal issues regarding their respective legal responsibilities, that would arise only where they



are in sharp disagreement over a major case.

For example, Pacific Legal Foundation cites a provision of the Act requiring Bonneville, when it exercises its authorities to protect fish and wildlife, to do so in a manner consistent with the Council's fish and wildlife program and energy plan. 16 U.S.C. § 839b(h)(10)(A). However, the roles of Bonneville and the Council in fish and wildlife matters are not involved at all in this case, which concerns model conservation standards. Moreover, the impact of this provision is further limited since [15] it requires the Administrator to also act consistent with other "purposes of the Act." These other purposes require Bonneville to balance its fish and wildlife protection responsi-

bility with its responsibility to provide an adequate, efficient, economical and reliable power supply. 16 U.S.C. § 839(2).<sup>4</sup>

---

<sup>4</sup> Another provision at issue requires Bonneville's actions pursuant to section 6 (i.e., resource acquisitions) to be consistent with the Council's conservation plan, "except as otherwise specifically provided in this chapter." 16 U.S.C. § 839b(d)(2). See also 16 U.S.C. § 839d(b)(1). As to major resources, as discussed in the text, petitioners argue that the Council has significant authority. However, as to non-major resources, the Act specifically provides that the Administrator may acquire a resource that is not consistent with the plan, if the Administrator (not the Council) finds the acquisition to be consistent with the governing statutory criteria. 16 U.S.C. § 839d(b)(2). Thus as to non-major resources, Council's plan is, as Congress intended, a planning document prepared by a separate body and designed to inform and guide the ultimate decision maker, while preserving for the Administrator the independent authority to apply the statutory criteria. This interpretation is consistent with the legislative history, which characterizes the Council's plan as a "guide" to the Administrator. H.R. Rep. No. 976, Part I,

[16] To the extent that Bonneville's interpretation of ambiguous statutory provisions might differ from the Council's, there are four considerations favoring deference to Bonneville's views.

---

<sup>4</sup> (FOOTNOTE CONTINUED)

96th Cong., 2d Sess. 28, reprinted in, 1980 U.S. Code Cong. & Ad. News 5989, 5994; H.R. Rep. No. 976, Part II, supra, at 33, 40; 6031, 6038. As the Chairman of one of the Committees that considered the legislation put it: "The Council cannot bind the United States in any way, manner, or form \* \* \*." 126 Cong. Rec. H10681 (daily ed. Nov. 17, 1980) (Rep. Dingell). See also 126 Cong. Rec. H10674 and H9842-43 (daily ed. Nov. 17 and Sept. 29, 1980) (Rep. Kazen); 126 Cong. Rec. H9852 and H9863 (daily ed. Sept. 29, 1980) (Reps. Swift and Foley).

Moreover, in making a determination whether his actions under 16 U.S.C. § 839d with regard to conservation and resource acquisition are "consistent" with the Council's plan (see 16 U.S.C. § 839b(d) (2), 839d(a)(1) and 839d(b)(1), the Administrator must also balance his other statutory responsibilities and practical limitations (e.g., funding limitations). 16 U.S.C. § 839f(b). These responsibilities include encouraging the widest possible use of electric energy, 16 U.S.C. § 832a(b), at the lowest possible rates to consumers [16] consistent with sound business principles, 16 U.S.C. § 825s, and assuring the Pacific Northwest an adequate,

First, it is Bonneville, not the Council, that is charged by Congress with actually administering the statutes pertaining to the Columbia River Power System, including the Northwest Power Act. See 16 U.S.C. § 839f(b). The Council has a more detached function, primarily of a planning nature.

---

<sup>4</sup> (FOOTNOTE CONTINUED)

efficient, economical and reliable power supply. 16 U.S.C. § 839(2).

Another provision discussed in the parties' briefs authorizes the Council periodically to review Bonneville actions to determine whether they are consistent with the plan and for other reasons. 16 U.S.C. § 839b(i). The Council may request the Administrator to take action to carry out the plan; and if the Administrator determines not to take the requested action, he must explain the basis for his refusal, and the Council may request an informal hearing. 16 U.S.C. § 839b(j). However, in this respect the Council's status does not differ from that enjoyed by private parties under several federal statutes, who may petition federal agencies to take action and may effectively require the agency to hold a hearing or make appropriate findings before denying the petition. See Davis, Administrative Law Treatise § 6.12 (2d ed. 1978); 15 U.S.C. § 2620 (provision of Toxic Substances Control Act governing procedures for citizens' petitions).

Second, in order to find that a federal agency is subject to control of state-appointed officers, there must be "'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous'." Hancock v. Train, 426 U.S. 167, 179 (1976). Third, the Court [17] should avoid interpretations that would raise a constitutional issue under the Appointments Clause. Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), vacated on other grounds, 431 U.S. 99 (1977). Fourth, to the extent that interpretation of the Act affects Bonneville's responsibilities, Bonneville's interpretation of the Act is entitled to "great weight." Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist., 104 S. Ct. 2472, 2479-80 (1984); Chevron U.S.A. Inc. v. Natural Resources Defense Council, 105 S. Ct. 28 (1984).

For purposes of this case, it is sufficient that the statutory provision affecting petitioners (model conservation standards and surcharges) does not present the Appointments Clause issue. But even if the Court were disposed to reach beyond this provision to address other matters not properly presented, the Appointments Clause issue would be clearly presented only with respect to the two provisions (those permitting the Council to disapprove an additional sale to direct service industrial customers or the acquisition of a major resource, if inconsistent with the plan) that actually give the Council an active role with respect to the Administrator's decisions.

B. A Substantial Issue Under The Appointments Clause Is Raised By Two Provisions of the Act.

With respect to two provisions of the Act previously described, 16 U.S.C. §§ 839c(d)(3) and 839d(c)(3) (relating to

sales to direct service industrial customers and major resource [18] acquisitions), we believe that a difficult constitutional issue would be raised under the Appointments Clause if the Council were to have occasion in the future to disapprove a proposed action of the Administrator. Our discussion of the merits of this issue is designed to show the Court that the issue has more complexity than might be gathered from the briefs filed to date. We express no view at this time as to how that issue should be resolved if the Court should reach it. The complexity and importance of the constitutional issue reinforces the considerations we set forth in Point III, infra, to show that the issue should not be decided in the context of this case.

The Appointments Clause provides that federal officers shall be appointed by the President, with specified exceptions. The Council argues that the sole



intent of the Clause was to protect the Executive authority from congressional encroachment, and therefore the Clause should not be read to preclude appointments by the governors. This view is untenable, for several reasons.

First, the express language of the Clause is that "[the President] \* \* \* shall appoint" officers of the United States--the Clause does not provide that "the Congress shall not appoint" officers of the United States. Second, congressional authority would be enhanced at the expense of the Executive if Congress had unrestricted power to confer the appointment authority on third persons.

Finally, the Framers had a clear intent to preclude state as well as congressional appointments. Indeed, at the Constitutional Convention, a motion to allow the appointment authority [19] to be "vested in the Legislatures or Executives

of the several States" was defeated after Gouverneur Morris objected that:

This would be putting it in the power of the States to say, "You shall be viceroys but we will be viceroys over you."

II Farrand, The Records of the Federal Convention of 1787, 406, 418-19 (rev. ed. 1937).<sup>5</sup>

---

<sup>5</sup> Before the vote on the motion, the reference to the "Legislatures" was stricken by consent, on the ground that "[i]f this be agreed to it will soon be a standing instruction from the State Legislatures to pass no law creating offices, unless the appointments be referred to them." II Farrand, The Records of the Federal Convention of 1787, 406 (rev. ed. 1937).

Another indication of the Framers' intent is found in the Federalists Papers, which describe one of the great weaknesses of the Articles of Confederation as being the need for the federal government to obtain the states' consent for every important federal action. As Hamilton put it, "the concurrence of thirteen distinct sovereign wills is requisite, under the Confederation, to the complete execution of every important measure that proceeds from the Union." Federalist Papers No. 15. A principal purpose of the Constitution was to eliminate this weakness, by allowing the federal government to "carry its agency to the persons of the citizens" without the "intermediate" assent of

Accordingly, it would violate both the language and the intent of the Appointments Clause for Congress to vest in the states the authority to appoint an official with national executive responsibilities, such as a Cabinet or sub-Cabinet officer.

However, this case could be viewed differently, since it involves a federal law dealing with an exclusively regional [20] problem, and officials acting only within the four states from which they were appointed.<sup>6</sup> The question then becomes whether, because of this feature of the case, the Council members may be

---

<sup>5</sup> (FOOTNOTE CONTINUED)

the States. Federalist Papers No. 16 (Hamilton). Widespread state appointment of federal officers would obviously undermine this purpose.

<sup>6</sup> The statement in the text is subject to one qualification. The Act defines the "region" serviced by Bonneville to include portions of Nevada, Utah, Wyoming and California. 16 U.S.C. § 839a(14). (The first three states

viewed as officers of the state whose governors appointed them or of an agency created by interstate compact, rather than federal officers, despite the significant federal authority they may exercise.

The Supreme Court on several occasions has sustained congressional enactments subjecting federal agencies to the operation of state law, including the determinations of state administrative agencies. California v. United States, 438 U.S. 645 (1978) (federal dam subject to state water resources agency); Hancock v. Train, supra, 426 U.S. 167 (federal facility

---

<sup>6</sup> (FOOTNOTE CONTINUED)

are specifically mentioned; portions of California are included under the definition in 16 U.S.C. § 839a(14)(B).) To the extent that the Council has significant authority over Bonneville's actions affecting persons outside the states from which Council members were appointed, it becomes difficult to argue that the Council members are state or regional, rather than federal, officers for purposes of the Appointments Clause.

subject to state air pollution regulations); FERC v. Mississippi, 456 U.S. 742 (1982) (state utility commission administers federal regulations regarding utility rate structures and cogeneration).

The Appointments Clause question, then turns on whether the Council members are state (or interstate compact) officers [21] exercising the kind of authority over a federal agency that the Supreme Court has sustained in the case of state water resource agencies, air pollution agencies, and utility commissions, rather than "officers of the United States" under the Appointments Clause.

On the one hand, it could be argued that the Council differs from the typical state or interstate compact agency, in the sense that the only significant authority the Council exercises is to constrain the actions of a federal agency, and this authority derives exclusively from the

Northwest Power Act.<sup>7</sup> By contrast the state agencies involved in California v. United States, Hancock v. Train and FERC v. Mississippi, administered state regulatory programs, based on state law, governing the legal rights and obligations of state residents.<sup>8</sup> Thus the

---

<sup>7</sup> The state statutes authorizing appointments to the Council do not give the Council members any state substantive law to administer. (These statutes are set forth in the Addenda to the Amicus Brief of the Pacific Legal Foundation.) The Council's authority to adopt a conservation plan--and any authority it may have as a result to impose constraints on federal agencies--flows exclusively from the Northwest Power Act. The situation is thus different from cases in which this Court has held Bonneville subject to state direction under state laws and regulations of general applicability controlling the siting of energy facilities and environmental standards. Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981); State of Montana v. Johnson, 738 F.2d 1074 (9th Cir. 1984).

<sup>8</sup> Similarly, the substantive terms of interstate compacts are often enacted by the legislatures of the party states, so that the officers of the compact agency are administering a statute that is the substantive law of the state, as well as federal law by virtue



[22] members of these agencies were clearly state rather than federal officers. This conclusion is less clear in the case of officials whose sole authority to impose legal obligations is with respect to a federal agency, and is derived exclusively from a federal statute.

---

<sup>8</sup> (FOOTNOTE CONTINUED)

of the compact approval of Congress. See, e.g., Texas [22] v. New Mexico, No. 65 Orig. (June 7, 1984), slip op. 9, 12-13; Cuyler v. Adams, 449 U.S. 438 (1981). The officers of such a compact agency may be more akin to state officers than federal officers for purposes of the Appointments Clause. For example, the substantive terms of the interstate compacts cited in the amicus brief of the National Governors Association (at 25) have all been adopted by the Oregon Legislature. Or. Rev. Stat. §§ 542.610-.630 (Klamath River Basin Compact); Or. Rev. Stat. § 469.930 (Northwest Interstate Compact on Low-Level Radioactive Waste Management); Or. Rev. Stat. § 507.040 (Pacific Marine Fisheries Compact); Or. Rev. Stat. § 483.875 (Multi-State Highway Transportation Agreement). The other compact cited, the Oregon-Washington Columbia River Fish Compact, Or. Rev. Stat. § 507.010, is an agreement not to change relevant state statutes without mutual consent. In all these cases, unlike the Council's situation, state substantive law is involved.



On the other hand, while the Council does not exercise regulatory jurisdiction over residents of the four Pacific Northwest states, it does have the important function of recommending conservation standards which Congress hoped would be adopted by states and localities within the Pacific Northwest region. Thus in an indirect way, the Council's recommendations could affect state regulation of Pacific Northwest residents. Also, the Council's responsibilities are regional rather than national in nature; where regional rather than national responsibilities are involved, it can be argued [23] that there is room in our federal system for Congress to give state-appointed officials authority to impose constraints on the operations of a federal agency.<sup>9</sup> For this reason, the Council members could be

---

<sup>9</sup> But see n. 6, supra.

viewed as state or interstate compact officers rather than federal officers, despite the significant authority they may exercise under two provisions of the Northwest Power Act.

III. THE COURT SHOULD NOT REACH  
CONSTITUTIONAL QUESTIONS  
RAISED BY STATUTORY PROVI-  
SIONS NOT INVOLVED IN THE  
CASE.

As we have shown, the only significant Appointments Clause issue involving the Council is raised by two statutory provisions that do not affect these petitioners. "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21 (1960). Accord: Warth v. Seldin, 422 U.S. 490 (1975).

Moreover, we have very little reason to believe that the two provisions of the Act which do raise Appointments Clause issues will give rise to controversy in the foreseeable future. As noted, these provisions involve imposing restraints on sales to industrial customers and on additional resource acquisition. Both provisions are likely to become controversial, if at all, [24] only in the future. The region is now in a situation of power surplus, which Bonneville expects to exist for a number of years. There is simply no reason for the Court to reach out to decide the constitutionality of statutory provisions which are not now in controversy and are unlikely to generate controversy within the foreseeable future.<sup>10</sup>

---

<sup>10</sup> Under section 4(b) of the Act, 16 U.S.C. § 839b(b), if "any substantial function or responsibility of the Council" were held unlawful by reason of the Appointments Clause, the Council would

Congress has specifically designated the Council's adoption of a conservation plan (including model conservation standards) as final action subject to judicial review, and has required suits to obtain judicial review of the plan to be filed within 60 days of publication. 16 U.S.C. § 839f(e)(1), (5). Under this statutory provision, the Court is required to take the case. However, Congress did not specify what constitutional issues have to be decided as part of a challenge to the plan. [25] While Congress expected

---

<sup>10</sup> (FOOTNOTE CONTINUED)

have to be reconstituted as a federally-appointed body. Thus petitioners in this case could benefit if provisions of the Council's statutory authority which do not affect them were held to invalidate the state-appointed Council. Nothing in section 4(b), however, indicates a congressional intent to alter the usual rule that a person must be affected by a statutory provision to challenge it. The statutory provisions that raise a significant issue under the Appointments Clause do not affect these petitioners.

challenges to the constitutionality of the Council, it left to the courts the question of who has standing to raise the constitutional issue. Since justiciability of the case would be in serious question absent the judicial review provision of the statute, the Court should decide no more than is necessary to comply with that provision, refraining from decision of a constitutional question under the Appointments Clause that does not implicate petitioners' rights.

The justiciability question is raised by the fact that the Council's model standards have no direct legal

---

<sup>10</sup> (FOOTNOTE CONTINUED)

Although the language in section 4(b) of the Act changed during its consideration, Congress consistently declared its preference for a state-appointed, over a federally-appointed, Council. See H. Rep. No. 976, Part II, supra, at 40-41, 6038-39; 126 Cong. Rec. S14697 (Nov. 19, 1980) (remarks of Sen. McClure); 126 Cong. Rec. H 9853 (Sept. 29, 1980) (statement of Rep. Swift). See also 16 U.S.C. § 839h.

impact on anyone. The Act specifically reserves to the states and their political subdivisions the right to develop and implement their own conservation programs. 16 U.S.C. § 839g(a). Only if a state or locality enacts a law requiring buildings to meet conservation standards will petitioners be subject to binding standards; and when that happens, the standards will be those of the enacting jurisdiction, not the Council.

In short, the Council's model standards may result in legal obligations being imposed on petitioners, depending on the outcome of two sets of decisions by other bodies: (1) state and local legislatures who might be persuaded to adopt the model standards, and (2) Bonneville, which might decide to impose a surcharge in areas where they are not adopted.

The fact that state and local legislatures might be persuaded to adopt the

model standards does not create a ripe controversy. In this respect, the Council is no different from [26] the Commissioners on Uniform State Laws; their recommendations may be very persuasive with state legislatures, but they do not present a case or controversy. The courts do not sit to affect the outcome of an ongoing political process.<sup>11</sup>

Nor would the fact that Bonneville might impose surcharges in areas that

---

<sup>11</sup> Energy conservation standards have considerable political appeal, entirely apart from what the Council may recommend. Indeed, as explained in the Amicus Brief of the California State Energy Resources Conservation and Development Commission, California adopted standards similar to the Council's model standards in 1981, two years before the Council's recommendation. Tacoma's Amicus Brief explains that these standards have been beneficial for utilities and homeowners in that City; if so, it seems doubtful that Tacoma would repeal the standards it has adopted even if this Court were to invalidate the model standards. Thus, "there is no reason to believe that the remedy sought will cure the plaintiffs' alleged injuries." Bowker v. Morton, 541 F.2d 1347, 1350 (9th Cir. 1976).



do not adopt the model standards normally constitute a basis for justiciability. The Act provides only that the Council may "recommend" surcharges and that Bonneville "may" adopt the recommendation. 16 U.S.C. § 839b(f)(2). Indeed, Congress rejected an amendment that would have required Bonneville to follow the Council's recommendation, on the basis that "[t]his change would raise constitutional problems because the council \* \* \* \* cannot, under the constitution, require a Federal agency to take action of this nature." 126 Cong. Rec. H10525 (daily ed. Nov. 12, 1980) (statements of Rep. Markey and Dingell). Where a recommendation will have no legal impact unless there is a further discretionary administrative decision, the recommendation does not normally present a justiciable [27] controversy--even in situations where the existence of the recommendation has a present economic impact.

Boating Industry Ass'ns v. Marshall, 601 F.2d 1376 (9th Cir. 1979); Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983).

The most that can be said is that the model standards might encourage other parties to take action which might injure petitioners. That was also the situation in Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976), where indigents challenged an IRS Ruling substantially reducing the medical care hospitals were required to provide them to maintain favored tax treatment. While acknowledging that the Ruling "had 'encouraged' hospitals to deny services to indigents," the Court concluded that "it does not follow \* \* \* that the denial to access to hospital services in fact results from [the] new Ruling, or that a court-ordered return by [IRS] to their

previous policy would result in these respondents' receiving the hospital services they desire." 426 U.S. at 42. Similarly here, it does not follow that Bonneville will impose surcharges, or that states and localities will make their decisions based on the legal question decided in this case rather than on the very considerable merits of the conservation standards themselves.<sup>12</sup>

[28] The precedents that we have discussed involve the concepts of standing and ripeness, which serve both as a

---

<sup>12</sup> See n. 11, supra.

[28] It might be added that even if states and localities are influenced by a desire to avoid threatened surcharges, they can avoid both the surcharges and the model standards--i.e., both sources of petitioners' alleged injury--by adopting other measures which produce comparable savings. One example would be innovative rate designs to encourage comparable energy savings. 16 U.S.C. § 839b(f)(2). Such rate designs would encourage homeowners to demand energy-efficient homes; but the encouragement of consumer demand for such homes can hardly be considered a legal (or even economic) injury to petitioners.

"constitutional limitation on judicial power" as well as a "self-imposed discretionary doctrine." Boating Industry Ass'ns v. Marshall, supra, 601 F.2d at 1380. In most situations, there is no statute requiring that a particular administrative action be subject to judicial review; thus it is not clear where the "constitutional limitation" ends and the "self-imposed discretionary doctrine" begins. There is such a statute in this case. However, compliance with the judicial review statute does not require the Court to decide the constitutionality of statutory provisions not necessarily involved in the case. Since these provisions have no effect now, and it is speculative whether they will ever be drawn into controversy, there is not a ripe controversy with respect to those provisions. In light of the exclusively statutory basis for justiciability and the

normal judicial reluctance to decide constitutional questions, we urge the Court not to address the Appointments Clause implications of any [29] provisions of the statute other than those relating to model conservation standards and surcharges.

APPENDIX Q

No. 83-7585  
IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEATTLE MASTER BUILDERS ASSOCIATION;  
HOMEBUILDERS ASSOCIATION OF SPOKANE,  
INC.; NATIONAL WOODWORK MANUFACTURERS'  
ASSOCIATION; FIR & HEMLOCK DOOR ASSOC-  
IATION; SHELTER DEVELOPMENT CORPORATION;  
CLAIR W. DAINES, INC.; CONNER DEVELOP-  
MENT COMPANY; DONALD N. McDONALD;  
SEATTLE DOOR COMPANY, INC.; HOMEBUILDERS  
ASSOCIATION OF WASHINGTON STATE,

Petitioners,  
vs.

NORTHWEST POWER PLANNING COUNCIL,  
Respondent,  
UNITED STATES OF AMERICA,  
Intervenor-Respondent.

REPLY BRIEF OF RESPONDENT  
NORTHWEST POWER PLANNING COUNCIL  
TO BRIEF OF THE  
UNITED STATES AS INTERVENOR

AARON M. PECK  
STEVEN G. HARMAN  
McKenna, Conner &  
Cuneo  
Twenty-Eighth Floor  
3435 Wilshire  
Boulevard  
Los Angeles,  
California 90010  
(213) 739-9100  
OF COUNSEL:  
LAURENCE H. TRIBE  
1525 Massachusetts  
Avenue  
Cambridge,  
Massachusetts  
02138  
(617) 495-1767

FRANK W. OSTRANDER  
General Counsel  
JANET C. HANSON  
Associate Counsel  
WILLIAM R. COOK  
Associate Counsel  
Northwest Power  
Planning Council  
850 S.W. Broadway,  
Suite 1100  
Portland, Oregon  
97205  
(503) 222-5161

Attorneys for Respondent  
Northwest Power  
Planning Council

. . . .

[5] BThe Council's Adoption of Its Plan, Including Model Conservation Standards, and Its Recommendation that BPA Impose a Surcharge on Electricity Sold to Jurisdictions that Fail to Implement such Standards, Have Significant and Continuing Legal and Practical Consequences for BPA and Other Federal Agencies. Accordingly, the Court Must Decide Whether the Council Members Are Federal Officers.

The Intervenor argues that the Act and the Council's twenty-year energy plan ("the Plan") adopted thereunder have had no operative impact. (Brief of Intervenor, pp. 8-11, 25-26.)<sup>5</sup> This is

---

<sup>5</sup> While the language used by the Intervenor to characterize the legal significance of the Council's conduct varies, it includes, for example the statement that "[t]he Council's powers with respect to model conservation standards are . . . of an investigative and informative nature. . . ." (Brief of Intervenor, p. 11.) The Intervenor acknowledges that two of the functions performed by the Council entail the exercise of "significant authority." (Brief of Intervenor, pp. 12-23.) While the acknowledgment is correct as far as it goes, it is incomplete. In reality, many functions performed by the Council have significant legal consequences and thus would entail the exercise of "significant authority." See, e.g., 16 U.S.C. §§ 839b; 839c; 839d.



incorrect. In fact, both the appointment of the Council under 16 U.S.C. § 839b(a) and the actual promulgation of the Plan by the Council have had significant operative effects on the Petitioners and others.

The core of the Petitioners' complaint is that the Plan itself predictably inceases the cost of new housing, both absolutely and relative to existing housing, as a direct consequence of the altered legal situation brought about by the Council's action. The Council has exercised several powers affecting this concern. It can issue and has issued model conservation standards and has recommended that surcharges be imposed on customers of BPA in jurisdictions which do not adopt the standards or implement comparable conservation measures. See 16 U.S.C. §839(b)(f); [6]Plan, Vol. I, p. 10-9. Upon, and only upon, the Council's recommendation, BPA may implement such sur-

charges using a methodology outlined by the Council.<sup>6</sup> Id.

In addition, the Council's Plan allows the acquisition of energy resources, if needed, including conservation, in excess of 50 average megawatts of generating capacity or conservation potential for a period of more than 5

---

<sup>6</sup> The Intervenor's suggestion that BPA could establish its own system of credits and surcharges under its § 839e ratemaking power is incorrect. Section 839e contains various provisions, the essence of which is that rates are to be based on cost. The fact that § 839e(e) authorizes BPA to set peak or seasonal rates reflective of the costs of marginal capacity or the higher costs of power in the low-water season does not imply that the Administrator can impose regulatory surcharges or credits to enforce his or her own energy plan, outside of the specific provisions of the Act. Thus, in the passage from Central Lincoln Peoples Utility Dist. v. Johnson, 735 F.2d 1101, 1122 (9th Cir. 1984), cited by the Intervenor (Brief of Intervenor, p. 10, n. 2), the court was approving rates reflective of the costs of power in the low-water season, not some regulatory rate scheme. This is not the surcharge contemplated by section 4(f)(2) of the Northwest Power Act, 16 U.S.C. § 839b(f)(2).

years. In that case, BPA is authorized, after a finding by the Council of consistency with the Plan, to expend funds required for such acquisitions. Otherwise, BPA must seek an act of Congress for the expenditure. See 16 U.S.C. § 839c. Billing credits for BPA customer-initiated generating resources may be awarded only if the resources are consistent with the Plan, in which case credits must be awarded. 16 U.S.C. § 839c(h). The promulgation of the Plan terminates the authority of BPA to award credits for resources solely on the basis of criteria in § 839b(e). Id.

Furthermore, BPA is required under § 839d(a)(1)(C) to take action "aiding the Administrator's customers and governmental authorities in implementing model conservation standards" such as those in issue here. Section 839d(a) also provides generally that "The Administrator shall

acquire such resources through conservation, implement all such conservation measures, and acquire such renewable resources which are installed by a residential or small commercial consumer to reduce load, as the Administrator determines are consistent with the plan. . . ."

[7]. Thus, it is clear that the appointment of the Council and the promulgation of the Plan have had several operational legal consequences. The only conservation standards that may be enforced through surcharges are those of the Council. BPA now may not enforce its own standards through the rate surcharge, nor may it appoint an alternative council capable of promulgating other standards. BPA may now grant billing credits only in accordance with the Plan.<sup>7</sup>

---

<sup>7</sup> Moreover, even though the Council action regarding surcharges is only a recommendation, BPA has an obligation, at a minimum, to take such a recom-

Moreover, because the model standards are the conerstone of the Council's Plan, the Council, in addition to recommending that BPA impose a surcharge if necessary, has included a broad range of measures in the Plan to ensure that widespread implementation of the standards does in fact occur. See Plan, Vol. I, p. 10-10, 10-17; Action Items 2.3-2.10, 12.1. Since the adoption of the Plan in April, 1983, BPA --consistent with 16 U.S.C. § 839d (a)(1)(C) -- has in fact undertaken implementation of those measures.<sup>8</sup>

---

footnote 7 continued

mendation very seriously rather than to lightly discard it as though it were merely the suggestion of some study commission. Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 103 S. Ct. 2856 (1983) (National Highway Traffic Safety Administration disregarded its statutory duty in revoking passive restraint requirements without providing good reason).

<sup>8</sup> The action items in the Plan which BPA is implementing include the following:

footnote 8 continued

- "Develop a consistent procedure for certifying compliance with these model standards. . . . " Plan, Action Item 2.3.
  - "Develop a procedure to review and evaluate alternative plans to achieve comparable savings. . . . " Plan, Action Item 2.4..
  - "Develop and implement an education program regarding the provisions of these model standards for builders, architects, designers, real estate appraisers, code officials, and lending institutions. This program shall be in place and operating by January 1, 1985 and shall be offered throughout the region." Plan, Action Item 2.5
- {8} "Assist the U.S. Department of Housing and Urban Development to develop and adopt electric energy-efficiency standards for manufactured housing in the Pacific Northwest. The standards should be cost-effective for the region and economically feasible for owners of manufactured housing. To the extent practicable, these standards should be consistent with the standards in this section for other types of construction." Plan, Action Item 2.6.
- "Provide technical and financial assistance to the housing industry (including builders, lenders, appraisers, etc.) for the implementation of a uniform regionwide energy-



## footnote 8 continued

efficiency rating system for new residential buildings. This rating system should be similar to that used by the Environmental Protection Agency to provide consumers with information about automobile fuel efficiency. The rating system should be usable by the homebuilding and lending industry and potential home buyers to estimate future use of electricity and qualification for home loans. This rating system should be consistent with that used for existing residential buildings. (see Bonneville action 1.9). This system shall be fully implemented on or before January 1, 1986." Plan, Action Item 2.7.

- "Develop and implement a program which provides incentives for meeting these model standards in residential buildings for which building permits are issued before January 1, 1986. The program shall be designed to result in at least 25 percent of the new residential buildings being built to the Council's model standard between January 1, 1984 and January 1, 1986. This program shall include:
  - o Certification by the local utility, local government, or by independent appraisers of houses which meet or exceed the applicable model standard.
  - o A public education and marketing program which emphasizes the energy saving features and value of houses that achieve the model standard.



footnote 8 continued

- o Efficiency awards to builders of houses which meet or exceed the applicable model standard." Plan, Action Item 2.8.
  - "Develop and initiate a program to provide financial incentives to homeowners where governmental entities have adopted and enforced the model standard, or a qualifying alternative plan, prior to January 1, 1986. The incentives provided in this program should be based on the estimated amount of electric energy to be saved by the dwelling (compared to an equivalent dwelling built to current code) between the time it receives its final certificate of occupancy and January 1, 1986. The incentive payment should be set at 4.0 cents per kilowatt-hour saved." Plan, Action Item 2.9.
  - "Pay for the incremental cost above that required to meet current code for a sample demonstration of houses built to the model standards. This program shall include:
- [9] o A sample of at least 1,000 single-family and 200 multi-family buildings which are separately metered for space heating, waste heating, and other appliance uses. The buildings should be located in proportion to population distribution across the region. The Council will consider a reduction in the sample size upon a demonstration that statistically significant results can be obtained with a smaller number of units.

footnote 8 continued

- o A measurement of the level of air infiltration and indoor air quality for the model houses.
- o Occupant data, including the type and number of appliances owned, family size, use of wood heat, thermostat settings, indoor air temperature, and other information determined in consultation with the Council.
- o A control group of comparable buildings built to current code or practice.

These demonstration houses shall be included in the number of houses built to the Council's model standards between January 1, 1984 and January 1, 1986, under the incentive program provided in action 2.7.

The program measures described in actions 2.3, 2.5, and 2.8 shall be carried out in cooperation with state and local governments, utilities, trade and professional associations, and other interested parties." Plan, Action Item 2.10.

- Develop and implement a program to reimburse state and local governments for the full incremental cost of adopting and enforcing all model conservation standards under this plan, so long as enforcement of the model conservation standards program as a whole is cost-effective. This program shall be in place and operating by January 1, 1985 and shall be offered throughout the region. Plan, Action Item 12.1.

[9] BPA is implementing these measures through a multimillion dollar program managed, in part, in cooperation with each of the states of the Northwest.<sup>9</sup> In Washington State, for example, consistent with Action Item 2.10 in the Plan, there are approximately 250 demonstration homes being built to the model standards. [10] Similar efforts are underway in Oregon, Montana and Idaho. By means of Action Item 2.10 alone, residences demonstrating the construction and use of the model standards will soon be available to consumers, governmental officials and the building industry throughout the Northwest.

As a result of these items in the Council's Plan and BPA's implementation

---

<sup>9</sup> BPA has budgeted a total of \$11.6 million in fiscal year 1985 to be spent in support of adoption and enforcement of the model standards. Issue Alert: BPA Revises Its Strategy for Future Resources, Bonneville Power Administration, Jan. 1985.

of them, the model standards are now having a significant impact in the Northwest. The City of Tacoma, Washington (the fourth largest city in the Northwest, Hammond, The Whole Earth Atlas 247 (1980)), as described in its brief amicus curiae, is at this very moment implementing the standards. Other jurisdictions have adopted or are now in the process of adopting or considering the standards through building codes or alternative measures. The City of Seattle, Washington (the largest city in the Northwest, Id.), for example, has opened public comment on its proposed adoption of an alternative plan that it estimates will save an amount of electric energy equivalent to that which would be obtained by the model standards. Proposed Revisions to the Seattle Energy Code, Seattle Dept. of Construction and Land Use, Jan. 15, 1985. Administrative proceedings are also

underway before the building code agency within the Oregon Department of Commerce. Oregon Building Codes Division's Response to the Northwest Power Planning Council's Model Conservation Standards (draft), Building Codes Div., Oregon Dept. of Commerce, Jan. 3, 1985. Bills adopting the standards are pending in the legislatures of Oregon and Washington. H.B. 2357 (Oregon); S.B. 4268, H.B. 948 and H.B. 1114 (Washington).

When and whether the model standards or equivalent measures will be adopted in every jurisdiction in each of the four states is at this time a matter for speculation. Whether a surcharge by BPA will in fact be imposed is at this time also [11] a matter for speculation.<sup>10</sup> The

---

<sup>10</sup> Ironically, there is nothing in the Intervenor's brief to suggest that BPA will refuse to impose the recommended surcharge. Moreover, the Intervenor explicitly acknowledges "the very considerable merits of the conservation measures themselves". (Brief of Intervenor, p. 27.)

mere possibility of a surcharge may be an important additional cause for implementation by many jurisdictions, as is the possibility of financial incentives for those who adopt. But what is not speculative is that the Council has adopted the Plan, incorporating the model standards and a broad range of measures to ensure their implementation, and indeed that members of the Petitioners who build homes in at least one major city in the Northwest -- Tacoma -- must comply with the standards today. Moreover, those of the Petitioners who build housing materials must plan new products now for the further implementation of the standards in the future. See Second Amended Petition for Review, October 6, 1983, at 8.

It cannot be said, then, that legal relationships have not been affected in a manner touching the interests of the Petitioners. BPA has been subjected to



constraints and obligations leading it to enforce the model standards as put forth by the Council. That BPA has not yet engaged in enforcement is immaterial, for such action is not a prerequisite to suit.

Indeed, the Intervenor acknowledges that the Council's power to limit the acquisition of "major resources" (i.e., those equivalent to 50 average megawatts of generating capacity for a period exceeding 5 years) probably is a "significant authority" (Brief of Intervenor, p. 13), but the Intervenor suggests that this authority has not yet been exercised. This latter statement is simply incorrect. With respect to any proposed acquisition of a major resource, BPA is under a current legal obligation either to make the acquisition consistent with the Plan or else to seek an [12] act of Congress for the acquisition. The Council need not



take further action to implement this restraint.<sup>11</sup>

---

<sup>11</sup> Moreover, the Intervenor reads too much into § 839f(b). It suggests that this provision grants the BPA Administrator broad discretion in balancing consistency with the Plan with the policies of §§ 839-39h. (Brief of Intervenor, p. 15, n. 4) This does not seem to be a fair reading of the statute. While § 839f(b) does provide that the Administrator shall discharge his executive and administrative functions in accordance with the policies of the Bonneville Project Act of 1937 (16 U.S.C. § 832 et seq.) and of §§ 839-39h of the Northwest Power Act, this section does not imply that the directives elsewhere that the Administrator's actions "shall be consistent with the plan" (16 U.S.C. § 839b(d)(2)) are subject to a broad balancing test. Rather, the only fair reading is that the Administrator shall obey the consistency requirements in addition to the policies of the 1937 Bonneville Project Act.

The Council also disagrees with any suggestion by the Intervenor that BPA can avoid its obligation to protect fish and wildlife based upon "its responsibility to provide an adequate, efficient, economical and reliable power supply . . ." (Brief of Intervenor, p. 15.) See Confederated Tribes and Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466 (9th Cir. 1984); Forelaws on Board v. Johnson, 743 F.2d 677, 682 (9th Cir. 1984.)

C. The Appointments Clause Issue Is Ripe for Adjudication Now.

This court cannot avoid determining whether Council members are federal officers on the ground that this proceeding does not involve the exercise of significant authority by the Council. As demonstrated above, the actions already taken by the Council have significant current legal consequences for the Petitioners and others. These consequences require decision of the Appointments Clause issue without delay.

The actions taken thus far by the Council meet the relevant tests of ripeness and justiciability enumerated by the Supreme Court in Duke Power Co. v. Carolina Env'tl. Study Group, 438 U.S. 59 (1978), for adjudication of constitutional challenges: 1) The alleged harms to Petitioners are traceable to the Council's exercise of authority in adopting the

Plan, including in particular the model conservation standards and Plan measures for implementation; 2) The alleged harms caused by the standards and the threat of their regionwide adoption would be redressed by the relief sought by the Petitioners. See Duke Power at 77-81.

[13] Early review is especially appropriate where, as here, the issue posed is predominately or purely one of law. Pacific Gas & Electric v. State Energy Resources Conser. and Devel. Comm'n., 103 S.Ct. 1713, 1720 (1983); Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967). No further factual development will significantly aid the court in its consideration of the legal question of the Council's constitutionality.

Nor does the Intervenor offer any reply to the fact that the Petitioners must raise their challenge now or be forever barred. Congress, desiring that

clouds on the authority of the Council be settled promptly so as to encourage voluntary compliance, has mandated that suits challenging the Plan be brought within 60 days after notice of the challenged final action is published in the Federal Register. See 16 U.S.C. § 839f (e)(5). The Petitioners cannot wait for the full tale to unfold. Nor is there any reason why they should be required to wait. Additional future actions by BPA or by the political jurisdictions or utilities in the region are not of consequence to the determination of this Appointments Clause challenge, which needs to be decided now.

. . . .

APPENDIX R

No. 83-7585

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEATTLE MASTER BUILDERS ASSOCIATION;  
HOMEBUILDERS ASSOCIATION OF SPOKANE,  
INC.; NATIONAL WOODWORK MANUFACTURERS'  
ASSOCIATION; FIR & HEMLOCK DOOR ASSOC-  
IATION; SHELTER DEVELOPMENT CORPORATION;  
CLAIR W. DAINES, INC.; CONNER DEVELOP-  
MENT COMPANY; DONALD N. McDONALD;  
SEATTLE DOOR COMPANY, INC.; HOMEBUILDERS  
ASSOCIATION OF WASHINGTON STATE,

Petitioners,

vs.

NORTHWEST POWER PLANNING COUNCIL,

Respondent,

UNITED STATES OF AMERICA,

Intervenor-Respondent.

PETITIONERS' REPLY BRIEF

John W. Hempelmann  
Paul Sikora  
Michael B. King  
DIAMOND & SYLVESTER  
400 Hoge Building  
Seattle, Washington 98104  
(206) 623-1330

Attorneys for Petitioners

. . . .

[22]2.     The Council's Appointment by State Governors Violates the Framers' Expressed Intent Regarding the Appointments Clause and the Separation of Powers.

The Council claims its appointment by State governors is consistent with the Framers' understanding of the separation of powers, because "legislation and appointment remain in separate hands . . . ." Resp. Br., 63 (citation omitted). The Council is wrong.

The Framers explicitly rejected a proposal to dilute the Executive's appointment power by permitting the Legislative branch to authorize State governors to appoint those exercising substantial authority pursuant to the laws of the United States. When the Constitutional Convention debated the Executive's appointment power, Edmund Randolph of Virginia expressed concern about its "formidable" nature, and suggested the

Legislature should be "left at liberty" to refer appointments "to some State Authority . . . in some cases." M. Farrand, 2 Records of the Federal Convention 405 (1911) ("Farrand") at 405. John Dickinson of Delaware then moved, with Randolph seconding, that the appointments power be amended to read "except where by law the appointment shall be vested in the Legislatures or Executives of the several States." 2 Farrand at 406. Roger Sherman of [23] Connecticut, however, objected to permitting State legislatures to make appointments. Id. at 406. Dickinson and Randolph then agreed to amend their proposal by limiting the Legislative Branch to vesting appointment power in State executives alone. Id. at 406. This modified proposal, squarely presenting the issue of State governor appointment of those exercising substantial authority pursuant to the laws of the United States,



was severely criticized, and decisively rejected. See id. at 406, n.12, 407, n.12, 419, n. 15. See also, 26, infra.

This rejection was consistent with the Framers' express understanding of the separation of powers. They believed "power is of an encroaching nature," and an "adequate defense" therefore "indispensably necessary for the more feeble . . . against the more powerful members of the government." THE FEDERALIST NO. 48 at 332, 333.<sup>15</sup> In particular, they

---

<sup>15</sup> Federal courts accord THE FEDERALIST great deference when passing on separation of powers matters. See United States v. Woodley, 751 F.2d 1008, 1010 n. 3 (9th Cir. 1985) (en banc) (upholding validity of recess appointments of Article III judges) (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 120, 187, 5 L. Ed. 257 (1821) (opinion by Marshall, C.J.)) However, the Homebuilders note the relevant papers of THE FEDERALIST must be read together. For example, numbers 47 through 51, by James Madison, constitute an extended meditation on the separation of powers. Madison himself notes how each paper in the series builds on what went before. See THE FEDERALIST NO. 47 at

believed this required protecting the Executive and Judicial Branches against Legislative ambition, as they had concluded, from experience under the post-Independence State constitutions, that the greatest threat to the separation of powers lay in "the tendency of republican governments . . . to an aggrandizement of the legislative, at the expense of the other departments. . . ." THE FEDERALIST NO. 49 at 341.<sup>16</sup>

. . . .

---

footnote 15 continued

331; NO. 48 at 332, 338; NO. 49 at 343; NO. 50 at 344; NO. 51 at 347. See also Nixon v. General Services Administrator, 433 U.S. 425, 511 n. 6, 97 S. Ct. 2777 (1977) (Burger, C.J., dissenting).

<sup>16</sup> The Framers saw that, "[t]he legislative department [was] every where extending the sphere of its activity, and drawing all power into its impetuous vortex. . . ." THE FEDERALIST NO. 48 at 333. They wanted to avoid the mistake of the State constitution authors, who, reacting to the abuses of an "hereditary

[36]4. The Council's Violation of the Separation of Powers Presents a Justiciable Controversy.

The United States contends this Court should not reach the Appointments Clause issue, claiming: (1) The Act's provisions affecting the Homebuilders do not raise an Appointments Clause issue; (2) the Homebuilders lack standing to make an Appointments Clause claim; (3) any Appointments Clause claim is not ripe for review. See U.S. Br., 17, 23-28. The United States is wrong.

a. The Act's provisions affecting the Homebuilders Raise an Appointments Clause Issue.

The Council action affecting the Homebuilders is the Plan's promulgation,

---

footnote 16 continued

[executive],” had forgotten the equally great danger of “legislative usurpation . . . .” Id. See also Buckley, 424 U.S. at 129 (citing Framers’ fear “that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches. . . .”).

particularly it calls for adoption of the new housing conservation standards. The BPA must conform to the Plan, unless the Act "specifically provide[s] . . . otherwise . . . ." [37] 16 U.S.C. § 839b(d)(2). The Act does not "provide otherwise" regarding conservation measures, such as the new housing conservation standards. See 16 U.S.C. § 839d(a)(1), (b)(5).<sup>35</sup>

---

<sup>35</sup> The BPA has discretion to acquire non-major resources, inconsistent with the Plan, if the BPA determines those resources would be consistent with the Act. See 16 U.S.C. § 839d(b)(1). However, this discretion does not extend to refusing to acquire resources through conservation. The discretion to acquire a resource does not logically include the discretion to refrain from acquiring a resource. The Act makes this clear: "Notwithstanding any acquisition of resources pursuant to this Section [839d(b)], the [BPA] Administrator shall not reduce his effort to achieve conservation . . . pursuant to Subsection [839d](a)(1)] . . . ." 16 U.S.C. § 839d(b)(5). 16 U.S.C. 839d(a)(1) requires the BPA Administrator to acquire "all" conservation measures consistent with the Plan.

The BPA therefore has a legal duty under the Act to acquire all new housing conservation measures mandated by the Plan.<sup>36</sup>

The Council's action therefore constitutes the exercise of substantial authority pursuant to the laws of the United States, and raises an Appointments Clause issue. See, e.g., Plan, Vol. I, Table 10-1; Buckley, 424 U.S. at 126; Section II. H.1, supra.

- b. The Homebuilders have standing to make an Appointments Clause claim.

Standing under Article III requires a party invoking a court's authority to show: (1) an actual or threatened

---

<sup>36</sup> Moreover, the Act authorizes the Council to compel the BPA to take final action on any de facto refusal to comply with the Plan. See 16 U.S.C. § 839b(j). The Council may then challenge this final action before this court. See 16 U.S.C. § 839f(e). The fact the Council has yet to force the BPA to comply with the Plan does not lessen the BPA's duty to comply, a duty that arose upon promulgation of the Plan.

injury; (2) fairly traceable to the challenged action; (3) likely to be redressed by a favorable decision. Preston v. Heckler, 734 F.2d 1359, 1364 (9th Cir. 1984) (finding standing). See Duke Power Co. v. Carolina Env. Study Group, Inc., 438 U.S. 59, 72, 74, 98 S. Ct. 2620 (1978) (finding standing). The Homebuilders satisfy these requirements.

The Homebuilders have suffered actual and threatened injury, fairly traceable to the Council's action. Several local governments have adopted the new housing conservation standards, and some state and other local governments are considering doing so. Home builders therefore face a significant business loss, as increased housing costs may drive thousands of families from the housing market, while wood door and window manufac[38]turers face a significant business loss, because of the elimination of the market for many

of their products, and the high cost of developing substitutes. See Petition for Review at 12; Second Amended Petition for Review at 8. Moreover, these injuries are likely to be redressed by a favorable decision, because it would render the Plan's new housing conservation standards a nullity.<sup>37</sup>

c. The Homebuilders' Appointments Clause claim is ripe for review.

Ripeness traditionally turns on "the fitness of the issues for judicial deci-

---

<sup>37</sup> The Homebuilders' standing is not affected by the possibility that a successor Council might reissue the standards, or that the BPA might acquire resources through them irrespective of the present Council's fate. Standing jurisprudence does not require a party, seeking to invoke federal jurisdiction, to negate such speculative and hypothetical possibilities in order to demonstrate the likely effectiveness of judicial relief. Duke Power Co., 438 U.S. at 77-78 (standing to challenge constitutionality of Price-Anderson Act's limitation on liability of private utilities for nuclear power plant accidents not affected by the fact the federal government might have built such plants on its own absent the liability limitation).



sion" and "the hardship to the parties of withholding court consideration." Pac. Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n., 461 U.S. 190, 200, 103 S. Ct. 1713 (1983) (finding question ripe for review); Montana v. Johnson, 738 F.2d 1074, 1076-77 (9th Cir. 1984) (finding question ripe for review). Both requirements are satisfied here.

First, the Appointments Clause claim is fit for a judicial decision. It gives rise to a straightforward legal issue: May the Council, as appointed, exercise substantial authority pursuant to the Act over the BPA? This court has the necessary facts to resolve it: The Council has been appointed, and has exercised substantial authority pursuant to the Act. See, e.g., Pac. Gas & Electric Co., 461 U.S. at 201 (review appropriate where issue posed is predominantly or purely one of law);

Buckley, 424 U.S. at 115-16 (reversing Court of Appeals) (finding Appointments Clause claim ripe for review) ("since the entry of judgment by the Court of Appeals, the [Federal Elections] Commission has undertaken to issue rules and regulations . . ."); Montana v. Johnson, 738 F.2d at 1076-77 (issue fit for review because "it raises exclusively legal questions"). [39] Second, withholding court consideration would mean hardship to the parties. Some local governments have adopted the Council's standards. While there is uncertainty about whether state and other local governments will do so, the Home-builders still require relief now, because Builders and materials suppliers must decide today whether to spend money on such things as changing construction techniques and developing new products. Such costs are the stuff of hardships that traditionally warrant prompt court action.

See, e.g. Pacific Gas & Electric Co., 461 U.S. at 200 (holding challenge to California state nuclear power plant moratorium ripe for review) ("To require the [electric power] industry to proceed without knowing whether the moratorium is valid would impose a palpable and considerable hardship on the [industry] . . ."); Montana v. Johnson, 738 F.2d at 1077 (finding suit for declaration that BPA was subject to state certification process for proposed power line ripe for review) ("Montana risks wasting expensive administrative resources if it determines BPA's compliance with its substantive provisions before receiving assurance that [BPA is] require[d] to compl[y]. [Footnote omitted.]

I. The Homebuilders Need Not Apply for Attorneys' Fees Until They Win This Case.

The time to apply for attorneys' fees is established by statute - "within

30 days of final judgment." 28 U.S.C. §

2412(B).

. . . .

APPENDIX S

No. 83-7585

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEATTLE MASTER BUILDERS ASSOCIATION,  
et al.,  
Petitioners,

v.

NORTHWEST POWER PLANNING COUNCIL,  
Respondent,

UNITED STATES OF AMERICA,  
Intervenor-Respondent.

ON PETITION FOR REVIEW FROM A FINAL ACTION  
BY THE NORTHWEST POWER PLANNING COUNCIL

PETITION FOR REHEARING WITH SUGGESTION FOR  
REHEARING EN BANC

OF COUNSEL:

HARVARD P. SPIGAL  
General Counsel

JAMES O. LUCE  
Assistant General  
Counsel

PAUL S. MAJKUT  
Attorney  
Bonneville Power  
Administration  
1002 N.E. Holladay  
Portland OR 97208

RICHARD K. WILLARD  
Assistant Attorney  
General

JAMES M. SPEARS  
Deputy Assistant  
Attorney General

WILLIAM KANTER  
ROBERT V. ZENER  
Attorneys, Appellate  
Staff

Civil Division,  
Room 3348  
Department of  
Justice  
Washington, DC  
20530

Telephone:  
202-633-4027 FTS

. . . . .

[6] The dissent rejected the argument that the Appointments Clause applies only to the separation of powers between Congress and the Executive:

Congressional authority would be enhanced at the expense of the executive if Congress had the unrestricted power to confer the appointment authority on third parties. To the extent that a governor can appoint a member of an interstate compact agency who would otherwise be subject to the Appointments Clause, the power of the executive is diminished.

Slip opinion dissent at 8.

ARGUMENT

We respectfully urge the Court to modify the opinion to make it clear that a) the powers of the Council at issue in this case do not constitute or affect the exercise of federal executive authority to the extent necessary to implicate the Appointments Clause and b) the Court does not decide the extent of any other power of the Council under the Act, or whether

such power is consistent with the Appointments Clause.

The language of the majority opinion as it presently stands is capable of an interpretation that decides an important constitutional issue not presented under the facts of this case. The Court's generalized constitutional discussion is unnecessary, overly broad, and may raise serious implications for the powers and responsibilities of the Executive Branch. We therefore urge the Court to rule simply that the Council conforms to the Appointments Clause with respect to the purely advisory authorities involved in this case, leaving for another day whether a State-appointed Council may exercise other more [7] significant authority in a manner consistent with the Appointments Clause.

The question of what powers Congress may give to a state or interstate compact agency to affect the operation of a



federal program raises a whole area of first impression in constitutional law. None of the briefs submitted to the panel cited any case involving a federal-state arrangement resembling this one, in which an ongoing interstate-compact planning process "directly overlap[s]" (slip op. at 3) an ongoing program conducted by a federal executive agency.

Nevertheless, the majority opinion does not appear to be limited to the purely advisory authorities involved in this case and could be read to suggest that Congress could properly vest in an interstate compact agency broad authority without raising questions of unconstitutional usurpation of the President's authority over a federal executive agency such as Bonneville. Until a specific occasion presents such a question, however, the the [sic] Court is not in a position to assess whether constitutional

limitations have been transgressed. The opinion should be modified accordingly.

THE COURT SHOULD NOT DECIDE  
CONSTITUTIONAL QUESTIONS NOT  
PRESENTED BY THE CASE.

The Court should not decide a significant Constitutional question in a case that does not present it.<sup>3</sup> The only authority of the Council directly involved in this case is its authority to [8]recommend model conservation standards. These standards impose no legal obligations on anyone; the Act specifically reserves to the States and localities full authority to adopt any conservation standards they may choose, or none at all. 16 U.S.C. §839g(a). Similarly, the Council's surcharge recommendation does not compel

---

<sup>3</sup> "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21 (1960). Accord: Warth v. Seldin, 42 U.S. 490 (1975).

Bonneville to undertake any particular action. 16 U.S.C. § 839b(f)(2).<sup>4</sup>

The panel majority stated that "one of the principal purposes of [the] Council is to represent state concerns about regional problems \* \* \*." (Slip op. at 4). This characterization is, in our view, entirely consistent with what Congress intended and fits the Council actions challenged in this case: The Council promulgated model conservation standards and recommended that Bonneville impose a surcharge in areas where the States or localities have not adopted the model standards or comparable measures, a recommendation that Bonneville is considering.

---

<sup>4</sup> In Buckley, supra, 424 U.S. at 137-8, the Court held that powers "essentially of an investigative and informative nature" could be exercised by persons appointed outside the Appointments Clause. The Council's authority to recommend non-binding standards falls squarely within this holding.

We agree with the panel majority that Congress can constitutionally authorize an interstate compact that creates a regional planning agency meeting the above description, and that such an agency may have the planning and recommending powers exercised by the Council to date. We would further agree that Congress may direct a federal agency that, as described by the panel majority, "operate[s] independently" (slip op. at 3) of the regional planning agency, to take the regional agency's plans [9] into account. There simply is no doubt about the constitutionality of the performance of advisory functions relating to federal programs by state or regional agencies.

The question how far Congress may authorize a state or regional agency to direct, rather than advise, a federal program without running afoul of the Appointments Clause is, however, one that

is largely unexplored. Cases holding that Congress may command a federal agency to obey generally applicable state laws or comply with established state processes<sup>5</sup> simply do not establish how far Congress may go in requiring a concededly federal program, like Bonneville, to take direction from state or regional officials rather than the President of the United States or the head of an executive department. The courts have had no prior occasion to consider when, if ever, persons appointed by the Governors have power over the administration of a federal program to such an extent that they must be regarded as actually wielding federal executive authority in a constitutional sense.

There was no occasion to consider that question in this case. The Council

---

<sup>5</sup> California v. United States, 438 U.S. 645 (1978); Hancock v. Train, 426 U.S. 167 (1976).

adopted its Plan and reviews it annually. As the Plan is amended, its contents change. Thus the effect of the Plan on Bonneville's actions will evolve over time. The proper scope and contents of the Plan and its permissible impact on Bonneville's operation have not yet been resolved even as a matter of statutory construction. Any implication that the Council is altogether immune from Appointments Clause challenge, [10] no matter how its powers might later be construed, would be both premature and erroneous.

Questions that may arise in the future from the Council's exercise of its ongoing planning process are simply not ripe for decision in this case. The doctrine of ripeness is designed to ensure that the courts decide cases only when they are "in a posture fit for judicial review." Public Citizen Health Research Group v. FDA, 740 F.2d 21, 30 (D.C. Cir.

1984) (emphasis in original); Peter Kiewit Sons' Inc. v. Army Corps of Engineers, 714 F.2d 163, 168 (D.C. Cir. 1983). Where, as here, the challenge to administrative action asks a court to rule on constitutional issues, the Supreme Court has consistently declined that invitation unless the effects of the allegedly unconstitutional action have been felt by the parties in a concrete way and the necessity for resolving the issue immediately is apparent. See, e.g., Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 569 (1947).

This Court has recognized that even in a nonconstitutional case, a person's standing to assert judicially cognizable injury depends on whether he falls within the zone of interests protected by the legal provision on which he bases his claim. Port of Astoria v. Hodel, 595 F.2d 467, 474 (9th Cir. 1979). In this case,



plaintiffs allege injury resulting from purely advisory action of the Council; they have sustained no injury at all from the Council's exercise of other statutory authorities going beyond the giving of advice and recommendation. Thus they have no standing to challenge the constitutionality of such authorities.

[11] The Council does have authority to recommend surcharges for customers in areas that have not adopted the standards or their equivalent. 16 U.S.C. § 839b(f) (2). However, Congress deliberately chose not to require Bonneville to impose the surcharges, on the ground that such a requirement "would raise constitutional problems because the council \* \* \* cannot, under the Constitution, require a Federal agency to take action of this nature." 126 Cong. Rec. H10525 (Nov. 12, 1980) (statements of Reps. Markey and Dingell). And in any event, petitioners have not

challenged the Council's surcharge recommendation; their sole challenge is to the model standards.

The panel majority, however, stated that it is "immaterial whether [Council members] exercise some significant executive authority over federal activity." Slip opinion p. 10. If this statement were taken to its extreme, there would be no limit to the significant management decisions of a federal agency that could be vested in State or interstate compact officials. Yet it would ignore the history and language of the Appointments clause to conclude that it allows state officials to appoint federal officers.<sup>6</sup>

---

<sup>6</sup> The proposition that the Appointments Clause is entirely inapplicable when appointment authority is vested in the States is untenable. When the Clause was under consideration at the Constitutional Convention, a motion to allow authority to appoint officers of the United States to be "vested in the Legislatures or Executives of the several states" was defeated after Gouverneur Morris objected that:

The question when that point is reached [12] remains highly abstract until a specific example of decision-making is before the Court. In considering constitutional challenges, the Court may not "consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." Barrows v. Jackson, 346 U.S. 249, 256 (1953). This rule "frees the Court not only from unnecessary pronouncements on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional applica-

---

footnote 6 continued

This would be putting it in the power of the States to say, "You shall be viceroys but we will be viceroys over you."

II Farrand, The Records of the Federal Convention of 1787, 406, 418-19 (rev. ed. 1966). Before the vote on the motion, Convention struck by consent its reference to the "Legislatures", on the ground that "[i]f this be agreed to it will soon be a standing instruction from the State Legislatures to pass no law creating offices, unless the appointments be referred to them." Id at 406."

tion might be cloudy." United States v. Raines, 362 U.S. 17, 22 (1960).

Solely by way of example, Section 4(h)(10)(A) of the Act, 16 U.S.C. § 839b(h)(10)(A) states in part:

The Administrator shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this Act and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan, if in existence, the program adopted by the Council under the subsection, and the purposes of the Act.

Depending on the future contents of the Council's Plan and program and the future actions of the Council and the Administrator, the question may arise whether that sentence merely requires the Administrator to take into account the Plan and program along with other "purposes of the Act," or purports [13] to command the Administrator to expend the federal fund

in any manner and in any amount commanded by the Council, so long as the purpose is protection and enhancement of fish and wildlife. Should such a question arise, the United States would expect to urge the Court to construe the section to give the Council an important advisory role, but not to impute to Congress the intention to take the unprecedented step of conferring on persons not appointed in accordance with Article II the power to command the expenditure of federal funds by a federal agency. One important argument for that construction would be the substantial constitutional question of first impression that would be presented if Congress were understood to have vested that power in a person not appointed in accordance with Article II.<sup>7</sup>

---

<sup>7</sup> Similar questions may arise under 16 U.S.C. §§839b(d)(2), 839b(i), 839d(a)(1), 839d(b)(1), 839d(b)(2), 839d(b)(3), 839d(c)(1), (2), (3). The United States may be expected to urge a similarly limiting construction of these sections of the Act.

In short, it is not possible to simply read the Act in the abstract and decide whether the authorities it confers implicate the Appointments Clause. Instead, a specific example of decision-making must be before the Court. In this case, the specific decision before the Court is purely advisory and thus does not implicate the Appointments Clause. That is all the Court need decide and, pursuant to the clear instruction of the Supreme Court, all the Court should decide.

APPENDIX T

No. 83-7585

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEATTLE MASTER BUILDERS ASSOCIATION;  
HOMEBUILDERS ASSOCIATION OF SPOKANE,  
INC.; NATIONAL WOODWORK MANUFACTURERS'  
ASSOCIATION; FIR & HEMLOCK DOOR ASSOC-  
IATION; SHELTER DEVELOPMENT CORPORATION;  
CLAIR W. DAINES, INC.; CONNER DEVELOP-  
MENT COMPANY; DONALD N. McDONALD;  
SEATTLE DOOR COMPANY, INC.; HOMEBUILDERS  
ASSOCIATION OF WASHINGTON STATE,

Petitioners,

vs.

NORTHWEST POWER PLANNING COUNCIL,

Respondent,

UNITED STATES OF AMERICA,

Intervenor-Respondent.

PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING EN BANC  
BY  
PETITIONERS SEATTLE MASTER BUILDERS  
ASSOCIATION, ET AL

John W. Hempelmann  
Paul Sikora  
Michael B. King  
DIAMOND & SYLVESTER  
2600 Columbia Center  
Seattle, Washington 98104  
(206) 623-1330

Attorneys for Petitioners



[3] 1. The Framers Expressly Rejected Giving Congress Power to Delegate the Executive's Appointment Power to the States. The Majority overlooks the critical fact that the Framers expressly rejected the idea that the Appointments Clause is not violated so long as Congress does not arrogate to itself the power to appoint or remove executive officers. On August 24, 1787, the Constitutional Convention voted down an amendment to the Appointments Clause to permit the Congress to delegate appointment power to state governors; a vote noted by both the Petitioners and the United States. M. Farrand, 2 Records of the Federal Convention (1911 ed.) ("Farrand") at 405-406, n.12, 407, n.12, 419, n.15; Pet. Reply Br. at 22-23; United States Br. at 18-19, n.19.

The Majority correctly states that "[n]o court has yet held that the appointments clause prohibits the creation of an interstate planning council with members appointed by the states". Majority Opp. at 9. However, because no court has yet addressed the precise issue raised in the case<sup>1</sup> does not leave the Majority free to ignore the clear [4] evidence of the Framers' intent. This refusal to acknowledge such evidence is an ahistorical

---

<sup>1</sup> While Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), did adopt a substantive test for determining whether an individual is an "officer . . . of the United States," and therefore subject to the Appointments Clause, 424 U.S. at 125-126, the Court there was confronted with a case that concerned an attempt by the Congress to arrogate to itself power to appoint such officers. However, this does not mean that Buckley and related recent separation of power decisions are irrelevant. On the contrary, the concerns underlying these decisions are additional grounds for questioning the Majority's view of the separation of powers. See discussion, infra, III.A.4.

approach to the separation of powers repeatedly rejected by the United States Supreme Court and this court. See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 73-74, 102 S. Ct. 2888 (1982) (plurality) (rejecting rule of "board legislative discretion" for determining what matters need be heard by Art. III Courts in favor of an approach "rooted in history"); United States v. Woodley, 751 F.2d 1008, 1010 n. 3 (9th cir. 1985) (en banc) (upholding validity of recess appointments of Art. III judges) (federal courts' accord great deference to contemporaneous records of Framers' intent when deciding separation of powers questions).<sup>2</sup>

---

<sup>2</sup> Indeed, in the landmark Appointments Clause case presently pending before the United States Supreme Court, Bowsher v. Synar, Nos. 85-1377, 85-1378, 85-1379, all the parties agree that a clear expression of the Framers' intent would be dispositive: the dispute is over whether one can discern such evidence. Compare United

. . . . .

[10] 2. The Majority Misinterpreted the Meaning of a Critical Statutory Requirement, "Economically Feasible for Consumers." The Majority has substituted its own concept of "economic efficiency" for the Act's requirement that the MCS be "economically feasible for consumers." Majority Op. at 20-21. Nowhere do the Act, the legislative history or the Petitioners mention "economic efficiency". The Majority overlooked that its use of this concept is identical to the Act's standard of "cost-effective for the region." It has nothing to do with the

---

footnote 2 continued

States Brief in Bowsher v. Synar, at pp. 13-21 (discussing Framers' intent) with Brief of the Speaker and Bipartisan Leadership Group in Bowsher v. Synar at 17, 25-28 (discussing Framers' intent regarding Comptroller General of the United States) (excerpts attached as Appendix to this Petition).

Act's independent standard of "economically feasible for consumers."

The Majority states that "the Plan relies on marginal cost to measure economic efficiency." Majority Op. at 20. Yet the Majority overlooked that this is the method by which the Council determined that the MCS were "cost-effective for the region." See [11] Plan Vol. I, 7-1 & 10-4; see also 16 U.S.C. § 839(a)(4). Compare 126 Cong. Rec. H9853 (daily ed. Sept. 29, 1980). The Majority then turns to the Act's legislative history. Yet none of the Majority's citations to that history concern the meaning of "economically feasible for consumers."

First, the Majority cites statements in the Congressional Record for the proposition that "economic efficiency should be based upon avoided cost, which is measured by marginal, not average, cost." Majority Op. at 21. Yet the

Majority overlooked that the two supporting cites are to discussions of the meaning of "cost-effective for the region." 126 Cong. Rec. 30181 (S 14692) (daily ed. Nov. 19, 1980) (justifying the 10% cost advantage given to conservation in the Act's definition of "cost-effective," 16 U.S.C. § 839a(4)(A) & (D)); H. R. Rep. No. 96-976 (Part I), 96th Cong., 2d Sess. 50 (1980) (explaining definition of "cost-effective").

Second, the Majority cites an earlier Senate Report. See Majority Op. at 21 (discussion S. Rep. No. 96-272, 96 Cong. 25 (1979)). Yet this report does not accurately express congressional intent. The Majority overlooked that the cited discussion involved an early, 1979 draft of the Act which did not distinguish between "cost-effective for the region" and "economically feasible for consumers." On the contrary, the draft at the time

blurred the distinction in its requirement that the MCS be "cost-effective for consumers." Id. at 4 & 25 (Re Sec. 4(f)).

As a result of these oversights, the Majority's equating of the concept of "economic efficiency" with "economically feasible for consumers" has abolished the distinction between "economically feasible for consumers" and "cost-effective for the region." Majority Op at 20-21. Yet the Act requires the MCS to be both "economically feasible for consumers and cost-effective for the region." 16 U.S.C. § 839b(f)(1) (emphasis added). If "economically feasible for consumers" is to mean anything, it must be different than "cost-effective for the region." No statutory provision should be construed as mere surplussage. Public Util. Comm'r of Oregon v. Bonneville Power Admin., 767 F.2d 622, 625 (9th Cir. 1985).



[12] Congress intended that each standard be unique. "Economically feasible for consumers" means that each, individual conservation measure must give the consumer more in savings of "average cost" electricity than the measure costs the consumer. 126 Cong. Rec. H9853 (daily ed. Sept. 29, 1980); H.R. Rep. No. 96-976, Part II, 96th Cong., 2d Sess. 43 (1980); explained in Pet. Op. Br. 28-40 & Pet. Rep. Br. 10-13.

The Majority incorrectly suggested that it may uphold an agency interpretation merely because it is reasonable. Majority Op. at 12-14 & 21. It overlooked the rule that when congressional intent is apparent it must be followed [sic]. United States v. Clark, 454 U.S. 555, 560, 102 S. Ct. 805 (1982); United States v. Roach, 744 F.2d 1252, 1253

(9th Cir. 1984)).<sup>5</sup> In Chevron USA, Inc. v. NRDC, 467 U.S. 837, 104 S. Ct. 2778 (1984), the Supreme Court deferred to a reasonable agency interpretation only after concluding that "Congress did not actually have an intent." 102 S. Ct. at 2783. Neither the Council nor the Majority followed congressional intent.

---

<sup>5</sup> The majority overlooked that, until now, this Court has given precedence to congressional intent. In all cases cited by the Majority for deference to reasonable BPA interpretations, Majority Op. at 13-14, the legislative history was either absent, ambiguous, or supported BPA. Department of Water and Power v. BPA, 759 F.2d 684, 692-94 (9th Cir. 1985) (legislative history supports BPA interpretation); Central Lincoln Peoples' Utility Dist. v. Johnson, 673 F.2d 1076, 1081, as amended, 686 F.2d 708, 714 (9th Cir. 1982) ("legislative history does not supply clear support for either side"); Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585, 599-60 & 602 (9th Cir. 1981) (reliance on legislative history, when apparent); ALCOA v. Central Lincoln Peoples' Util. Dist., 467 U.S. 300, 104 S. Ct. 2472, 2481-85 (1984) (legislative history supports BPA interpretation).

APPENDIX U

Doc. 233/01396  
MINUTES  
CONSERVATION SUBCOMITTEE

May 21, 1982  
1:00 p.m.

Northwest Power Planning Council Offices  
700 S.W. Taylor Street, Suite 200  
Portland, Oregon

. . . .

[2 ] III. Model Conservation Standards

Tom Eckman, Conservation Analyst on the Council staff distributed three issue papers ralated [sic] to the development of model conservation standards. He noted that the Act requires that three types of standards must be included in the plan: standards for new and existing structures, standards for utility, customer and governmental programs and standards for other consumer actions. Eckman asked that the subcommittee first focus its attention on the issue of the

appropriate level for the model standards. After some discussion, Hemmingway summarized three options:

1. Set standards at a level based on their cost-effectiveness compared to average cost paid by consumers. Offer consumers an incentive to achieve greater efficiency up to marginal resource costs.
2. Set standards at a level based on their cost effectiveness compared to the marginal resource cost faced by the region. Subsidize consumers to achieve these standards at a level equivalent to the difference between average and marginal cost.
3. Same as option 2, except offer no subsidy to achieve standards.

Both Hemmingway and Eckman indicated that the third option was prohibited by the Act, because it specifies that the standards must be "economically feasible for consumers".



## APPENDIX V

Doc. 440/01494  
NEW AND EXISTING STRUCTURES MODEL  
STANDARDS AND CONSERVATION PROGRAMS  
DECISION MEMORANDUM

### ACTION

Recommendation 1 - The staff recommends that the Council adopt the following model standards for new and existing structures for the purpose of its draft plan:

- o A standard for new residential structures which specified minimum total building performance with prescriptive and component attainment paths as alternatives. The proposed space heating performance standard for new single family and multifamily structures in kwh/sq. ft./yr. is shown in the table below:

Building Type	Climate Zone		
	1 (West of the Cascades)	2 (E.Wash/ E.Or & Idaho)	3 (W.Mont.)
Single Family	2.0	2.6	3.2
Multifamily (5-plex and larger)	1.2	2.3	2.8

- o A standard for new non-residential structures which is based on the most recent version of the American Society of Heating, Refrigeration and Air



Conditioning Engineers (ASHRAE)  
model energy code.

- o A standard for existing residential structures which specifies installation of all physically feasible measures deemed cost-effective\* from the Region's view and which are fully financed by the Region. The cost-effectiveness determination may be made based on an on-site audit or by selecting items from an approved list of measures which have been demonstrated to be Regionally cost-effective.
- [2] o A standard for existing non-residential structures based on an on-site technical audit, which specifies installation of all physically feasible measures deemed to be cost-effective from the Region's view and which are fully financed by the Region.

---

\*Section 4(f)(1) of the Act requires all Model conservation standards to be, among other requirements, "cost-effective for the region and economically feasible for the consumers." Throughout this memo the analysis is of what is "economically feasible for the consumer." The "cost-effectiveness analysis is made pursuant to Section 4(e)(1) when the other conservation resource is measured against listed resources.

Recommendation 2 - The staff recommends that the Council defer its decision on the following programs until its December 8 and 9 meeting.

- o A reimbursement program to code enforcement agencies for the cost of model standards implementation and inspection. This includes the inspection cost of any entity (e.g. utility, local government, etc) which implements the model standard for existing structures.
- o An incentive program, offered for a period of five years, which pays up to the full cost incurred by builders between current construction practice and those practices specified by the model standard for new structures.
- o An incentive program which provides full financing of audit and retrofit measures for existing electrically heated and/or cooled [sic] residential and non-residential buildings.
- o An education program for builders and code enforcement officials regarding the provisions of the Council's model standards for new structures.

- o An incentive program to encourage the construction of structures which exceed the Council's efficiency standards for new structures.
- o Provide for assistance program to the housing industry for the implementation of an energy performance rating system for new and existing residences.
- o An incentive program targeted at the manufactured housing industry to encourage the sales of energy efficient units which achieved the following performance standards:  
Zone 1 - 3.0 kWh/Sq. Ft/yr., Zone 2 - 5.4 kWh/Sq. Ft/yr, and Zone 3 - 7.0 kWh/Sq. Ft/yr.

Recommendation 3 - The Staff recommends that the "economically feasible" level of the Council's model standard for new residential structures be determined according to the following presumptions:

Presumption 1. The "economically feasible" analysis is to be made by comparing individual conservation measures with the cost and performance of structures built to current standards.

- [3] Comment. This assumption requires that individual measures (e.g., adding R-19 wall insulation) rather than packages (e.g. adding R-19 wall insulation, R-38 ceiling insulation and weatherstripping) be cost-effective. Consequently, "low cost, high payoff measures" are not averaged with "high cost, low payoff" measures to allow the latter to appear more economical. The use of existing standards as the point of comparison presumes they are, by political consensus, "economically feasible" for consumers.

Presumption 2. If the present value of the increased mortgage cost (due to the conservation investments) plus the present value of the energy cost is less than that for a structure built to current standards, the measure will be accepted as "economically feasible."

Comment. This assumption presumes that consumers are concerned about reducing the total annual (or monthly) cost of owning and operating a structure. Thus, if an energy conservation investment financed as part of a mortgage does not reduce the present value of their annual (or monthly) electric bill by enough to offset the present value of their increased mortgage payment, it is not "economically feasible."

Presumption 3. To accommodate the consumer's time preference for money, a real (i.e., inflation adjusted) discount rate which is equal to or greater than a real mortgage rate will be assumed.

Comment. Consumer's [sic] individually tend to place a substantially higher value on near term cost and benefits than on those in future years. This characteristic is captured by a procedure known as "discounting". The higher the discount rate the less value consumers place on the future. Assuming a discount rate at least equal to or higher than the consumers mortgage rate implies that future cost savings from conservation are less important than the impact of the conservation investment on "first cost."

Presumption 4. Energy cost savings to determine if the measure is economically feasible are to be valued at an amount which is equal to the electric rate paid for space heating by consumers, including rate increases above inflation.

Comment. This assumes that the price consumers pay per kilowatt hour for space heating will escalate over time at a rate greater than inflation. The exact values for all

the variables, such as long term mortgage (interest) rates and real escalation rates for electricity, etc., are not known with great precision. Subsequently, a sensitivity analysis was conducted. A sample of the results of this analysis are included in the accompanying "Issue Background" paper. Additional results from this analysis were presented to the Council during its November 3rd and 4th meeting.





## APPENDIX W

### MINUTES - MEETING NO. 36 PACIFIC NORTHWEST ELECTRIC POWER AND CONSERVATION PLANNING COUNCIL

December 28-29, 1982  
The Hilton Hotel  
Portland, Oregon

#### Members Present:

Keith L. Colbo (MT)  
Charles T. Collins (WA)  
Daniel J. Evans (WA)  
Alfred A. Hampson (OR)  
Leroy H. Hemmingway (OR)  
Larry Mills (ID)  
Gerald H. Mueller (MT)  
Robert W. Saxvik (ID)

#### Staff Present:

Thomas Eckman, Project Management Staff  
James Fell, General Counsel  
Thomas Foley, Project Management Staff  
James Litchfield, Director -  
Project Management  
Marilyn Podemski, Associate Counsel  
Edward Sheets, Executive Director  
Beata Teberg, Staff Assistant  
T Vinyard, Council Coordinator  
John Wilson, Director -  
Public Information

. . . .

#### INTRODUCTION

Noting that the meeting would be as much as possible in an informal working session format, Mr. Sheets recalled that the past

few meetings had focused on a resource portfolio which is one way of saying a mix of resources that Staff analysis indicates performs fairly well over a wide range of potential futures that the Region may be facing. The goal is to come up with a flexible mix of resources that performs well across a wide range of futures without necessarily committing the Region to overbuilding power plants.

Mr. Litchfield reviewed the elements involved in the analysis of conservation. Some points to remember:

- Conservation measures are individual actions that can be taken at the points of end use of electricity to try to achieve efficient use of electricity (storm windows and doors, improved insulation, et cetera)  
.....

[4] MOTION Member Mueller moved acceptance  
82-88

of Recommendation 3 and the four numbered Presumptions contained therein as follows: The Staff recommends that the "economically feasible" level of the Council's model standard for new residential structures be determined according to the following presumptions: PRESUMPTION 1. The "economically feasible" analysis is to be made by comparing individual conservation measures with the cost and performance of structures built to current standards. PRESUMPTION 2. If the present value of the increased mortgage cost (due to the conservation investments) plus the present value of the energy cost is less than that for a structure built to current standards, the

measure will be accepted as  
"economically feasible". PRE-  
SUMPTION 3. To accommodate the  
consumer's time preference for  
money, a real (i.e., inflation  
adjusted) discount rate which is  
equal to or greater than a real  
mortgage rate will be assumed.  
PRESUMPTION 4. Energy cost  
savings to determine if the  
measure is economically feasible  
are to be valued at an amount  
which is equal to the electric  
rate paid for space heating by  
consumers, including rate in-  
creases above inflation.

Motion was seconded by Member Collins,  
and passed unanimously by voice vote.

APPENDIX X

MEETING NO. 7  
PNW ELEC POWER & CONSERVATION PLANNING  
COUNCIL  
SEATTLE, WA  
July 13-14, 1981

EVANS [Council Chairman]: The 7th meeting of the Pacific Northwest Power Council will come to order.

. . . .

[1a-14] HEMMINGWAY [Council Member]: Mr. Klauser, I think you made a number of statements that I would like to correct or at least get you to clarify. You talked about the cost effective standard in the Act means marginal cost pricing. I wonder if you could point to the place in the Act where marginal cost pricing is likely to occur, or that any consumer would pay for a conservation measure undertaken in that consumer's dwelling or business on a marginal cost basis.

KLAUSER [Seattle Master Builders Association Representative]: We have been keeping tabs on the voluminous amount of

material coming out of BPA, a tremendous amount of testimony. And it seems to us from our position that the rule of the game that we've been reading--now whether this is in the Act or not I can't specify--but the way, the direction everyone has been taking in the discussion of the concept of energy conservation cost effectiveness is weighing cost effectiveness against the last increment of power to be bought. Whether that means the 20-year WPPSS bonds cost, or some other.

HEMMINGWAY: That's correct, but is there anyplace where a consumer would pay for a conservation action on a marginal cost basis?

KLAUSER: Sure. They would pay for it in two ways, and my next speaker up will discuss that specific issue. But it comes down to this. Every action that is required of the consumer has a cost to it. And if it was insulation, for instance,

that would be equated with so much for kilowatt hour used. Now that amount of money, we feel, is the key issue--how much they spend on these various things that are legislated. And of course in the Act there is a major provision, speaking about the incentives first of all is there, but there is also the stick and the carrot. And the stick is if you don't follow our methodology that gets firmly established in all the states, and buy your [1a-15] electricity up to 1-1/2 times the cost it would cost everybody else. That's a major problematic area for us, and we feel that you better look at it in terms of whether you are really dealing with the scientific approach or is it just pie-in-the-sky computer analysis.

HEMMINGWAY: I don't disagree with you that we should look at it from a scientific approach, but I don't think you should misrepresent the Act that consumers are



going to be spending money after the marginal cost of electricity in conservation measures. And I think I can point to the provisions in the Act which we worked very hard on to ensure that that wouldn't happen. And I think that it's a disservice to the public for you to come here and represent that that's the case.

KLAUSER: Well, at this point we agree that it's very early to be discussing which direction it will finally take. We are alarmed at what is taking place down in Portland, and we've been able to sit in on hearings concerning the incentives, to be the formula for incentives. And we view that formula to be totally theoretical and to be assuming tremendous amounts. Now whether the Act says that or not, you may be totally correct. I'm not prepared to address that question. You're the expert on that issue. We're just trying to get off on ..... right now,

and we assume that you'll have plenty of time to correct that.

HEMMINGWAY: Well you did address it in commenting on cost effectiveness. You said I believe it's your duty to tell the public that these words mean marginal cost pricing.

KLAUSER: Well then if they're not, I stand corrected. Our point is that the direction that everyone seems to be going in--whether this Council is included or not, I don't know; but in terms of BPA--is that direction.

HEMMINGWAY: Well it is true that all conservation actions that are to be undertaken in the region are to be compared with the marginal cost, but that does not mean that consumers are going to pay the marginal cost for electricity or that they are going to undertake conservation actions in their houses or in their businesses which they have to pay for at

the marginal cost. If you'll read the Act you'll see that that isn't the case.

KLAUSER: Well we're very happy to hear that then, as long as that's the ?part? I was talking about.

. . . .

[1b-4] [KLAUSER:] On the next page, on 1., the cost effectiveness of each potential conservation action should be assessed. The cost effectiveness definition has to be expanded or more specifically set out that cost effective is to the one that the burden is imposed on, the consumer. Cost effectiveness is not the cost effectiveness to the utility that has to buy that additional increment of power because that additional increment of power is melded back into the total cost of the power, and it's unfair to make the new home buyer assume that total obligation. Now admittedly the incentives are there. There is some suggestion that they be as

high as \$2.50/kwh, which is absurd. You could get an active solar system, I think, at \$2.50/kwh. Not very cost effective or economic on anybody. But, in any case, I think that we want to talk in terms of equity, and Act talks in terms of equity, and that all residential users, new and old, should be treated the same.

The question where will our children live, the upward mobility of new home buyers is going to be restricted if they have higher costs imposed on them than the public generally.

. . . .

[KLAUSER:] I guess, Chairman Evans, since you've indicated that we should keep our remarks [1b-5] for another time on the technical or specific issues and substantive parts, I would reserve that and come at another time and advance that.

EVANS: We certainly will want--there certainly will be ample opportunity for that. It's obvious that you are making a

very important point and it is one which the Council will have to deal with at some length. I'm just trying to make sure that we get adequate opportunity for all to speak today and get us to the point, in turn, where we can finalize a workplan from which we can go into these other elements. So I think that these are useful points. Are there other questions from members of the Council?

HEMMINGWAY: We've heard the same thing again, that cost effectiveness should be measured only on the consumer of electricity, and we should only adopt measures which are cost effective to the consumer. If that's your position, Mr. McDonald, I suggest you lost that battle when Congress passed this Act. And if you go back to the definition of cost effectiveness, you'll see that cost effective, when applied to any measure or resource, means that such measure or resource must be

forecast to be reliable and available and to meet or reduce the electric power demand as determined by the ?counsel of? ?Council or? the Administrator of the consumer or customers at an estimated incremental system cost. And that's the critical issue--incremental system cost no greater than that of the least cost similarly reliable and available measure or resource.

Now it simply isn't within the power of this Council to adopt only such conservation measures which would be cost effective to the individual/consumer. MCDONALD [Hombuilder]: Well I guess on 94, the Statute 2712 of PL 96-501, the Administrator, I guess would be where we have our remedy or relief because if he determines that any proposed conservation measure or resource is not equitable or cost effective, or whatever, then apparently he has that power to

HEMMINGWAY: Well the idea in the Act was to have the conservation measures viewed from a system perspective. That is we would go out and look at what investments we could make from a system perspective that would save energy at a cost cheaper than building new generation. That does not mean that we're going to impose all of those costs of those conservation measures on the consumers who are undertaking them. It may well be that the system will pick up a good portion of those costs.

[1b-6] MCDONALD: Well, Mr. Hemmingway

HEMMINGWAY: For instance you mentioned that a solar water heater would save only \$90/year. Well, from a system perspective, if we price electricity at 8¢/kwh, which a lot of people are pricing the future cost of electricity, that solar water heater would save electricity at \$360/year. And the region may find it



beneficial to invest that amount of money in that solar water heater in order to save that \$360/year to the region, and not impose that entire cost on the consumer.

MCDONALD: I didn't specifically talk about incentives. I talked about mandatory conservation. If you require the new home buyer to assume the sole burden of the solar water heater, that's one thing. I think that's our argument. I didn't address

HEMMINGWAY: We're not even authorized under the Act

MCDONALD: I didn't address the collateral issue of incentives. If you or the BPA want to pay the full avoided cost vis-a-vis the average melded cost or retail cost of the utilities, that's a different issue.

HEMMINGWAY: We are required to do that under the Act, and I wish you'd go back to the Act and read it. If you read the

model conservation standard provision under the Act, we're allowed to design conservation standards only which are cost effective for the region and --conjunctive "and"--economically feasible for consumers, taking into account financial assistance made available to consumers from the Administrator. That was very well thought out by the Congress.

MCDONALD: That goes to the argument and the findings. And I would submit that I would think that these rulemaking procedures would be done in the Federal Administrative Procedures Act which should be a part of the workplan, too, Chairman Evans, I think. And so--and I don't think our case was lost with the Congress because we went through an analagous situation with the Washington Utilities and Transportation Commisssion. So I don't think that's correct. I don't think our day is gone. I think we still can be heard on this issue--the consumer . . .

EVANS: Do I hear you making assertion that it would be more beneficial to ultimately go out and build new resources at a higher price, higher marginal cost than you could obtain those same number of kilowatts through conservation measures?

[1b-7] MCDONALD: No, I did not say that. I said that I did not think the new home buyer or renter, as opposed to the old home owner, should be imposed with a burden different than each other. That they should both, in effect, pay the same cost. Now if the BPA wants to give an incentive at 100%, that's a different issue. I'm not sure the ratepayers shouldn't examine whether it's cost effective. But we're not going to make that argument. Our primary argument is the fact that we don't think we should be treated differently as builders of new homes, nor should our customers, our buyers of new homes be treated differently.

EVANS: But, you're, of course, aware that that simply doesn't stand up. Consistently over the years new purchasers of goods, whether they are houses or automobiles, are subject to changing requirements, changing laws. People who run old cars don't have to meet the same pollution requirements as those who buy new cars. So they aren't treated exactly alike.

MCDONALD: Well I'm glad that

EVANS: The same is true in terms of housing.

MCDONALD: I'm glad you made that point, Chairman Evans. Historically, building codes have dealt with health, life, property, and safety. A structural engineer who over? only? designs a bridge by three, because if the bridge falls down you lose your life. But we're talking about economic planning, and some of us believe that the marketplace is a better place for economic planning, and as

I indicated, it's not the historical application of a building code or a health code that we're talking about. We're talking about economic planning. And as I indicated, nobody's health, life, property, or safety are in jeopardy, and so therefore we have to treat this issue separately, differently.

EVANS: You will if the lights go out.

MCDONALD: Well I think Mr Ellis indicated that they were prepared to furnish all available power. I notice that the windmills--those 250-watt windmills, there aren't very many of them on line, and maybe you ought to put a few more of those on line, or coal, or whatever. But I think there's a lot of resources still available that haven't been used.

But as I indicated, I don't think the new home buyers should pay the very, very, very extreme avoided cost.

HEMMINGWAY: The Act doesn't authorize it.

[1b-8] MCDONALD: It's discretionary as far as you're concerned.

COLLINS [Council Member]: Don, the problem you present is a real one. And the whole heart of this Act, as I understand it, was designed to deal with that problem, that you couldn't expect individual conservors to pay for a marginally cost facility through savings of melded--through melded electrical rates. That's the whole idea of this Act, is to find a way to break that roadblock. And the way to break that roadblock is to relieve the person who is providing a system benefit not incurring an individual benefit at that level.

MCDONALD: But you don't do it with mandatory conservation in a power sales contract. You don't do it with a penalty

or a surcharge in a power sales contract. You don't do it by forcing where, in the technical validity of the code, which another speaker will address, is suspect as far as its cost effectiveness

COLLINS: The technical validity of the code, or of R values and U values is very much a point. Good point. I don't have any quarrel with that. I think what Mr. Hemmingway has objected to, and I am beginning to, Don, is that the problem that you raised has been solved. The idea of this Act is to secure more effective, cost effective resources through conservation and other techniques and to not place that burden on an individual consumer.

MCDONALD: Are you saying they're mutually exclusive?

COLLINS: I'm not saying--I'm saying this Act has made them in a very attractive way mutually exclusive. The problem that you've raised won't happen.



MCDONALD: Well maybe I don't understand it the same way you do. I don't see that. But I'm prepared to listen.

COLLINS: Well it's probably not the time or the place to pursue that.

MCDONALD: That's the ?forum? the Chairman indicated before.

EVANS: I think that that's something we will have to get at. But I think it's terribly important at this point to not mislead people as to what is likely to happen, or what the Act, itself, says. And I think both Mr. Hemmingway and Mr. Collins have pointed out, I think, quite clearly that it certainly was the intent of the drafters of the Act; I think it's quite clear [1b-9] in the language of the Act, that those individual homeowners are not to bear that marginal cost of electricity.

MCDONALD: You mean the new homeowners.

EVANS: The new homeowners. Any other questions from members of the Council? Thankyou very much.



DEC 12 1986

JOSEPH F. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1986

SEATTLE MASTER BUILDERS  
ASSOCIATION, ET AL., PETITIONERS

v.

PACIFIC NORTHWEST ELECTRIC POWER AND  
CONSERVATION PLANNING COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED  
*Solicitor General*

RICHARD K. WILLARD  
*Assistant Attorney General*

JAMES M. SPEARS  
*Deputy Assistant Attorney General*

WILLIAM KANTER  
ROBERT V. ZENER  
*Attorneys*

*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 633-2217*

HARVARD P. SPIGAL  
*General Counsel*

JAMES O. LUCE  
*Assistant General Counsel*

L. RANDALL WEISBERG  
*Attorney*

*Bonneville Power Administration*  
*Portland, Oregon 97208*

26pp



## QUESTION PRESENTED

Whether the court of appeals correctly sustained the validity of model energy conservation standards issued by the Pacific Northwest Electric Power and Conservation Council, a body established pursuant to federal statute and composed of eight persons appointed by the Governors of the four States in the Pacific Northwest.



## TABLE OF CONTENTS

	Page
Opinion below .....	1
Jurisdiction .....	1
Statement .....	2
Argument .....	11
Conclusion .....	21

## TABLE OF AUTHORITIES

### Cases :

<i>Aluminum Co. of America v. Central Lincoln Peoples' Utility District</i> , 467 U.S. 380 .....	2, 3
<i>Bowsher v. Synar</i> , No. 85-1377 (July 7, 1986) .....	13, 15
<i>Buckley v. Valeo</i> , 424 U.S. 1 .....	8, 9, 10-11, 13, 16, 17
<i>California v. United States</i> , 438 U.S. 645 .....	8, 13
<i>Cuyler v. Adams</i> , 449 U.S. 433 .....	8
<i>Northeast Bancorp, Inc. v. Board of Governors</i> , No. 84-363 (June 10, 1985) .....	10, 14

### Constitution and statutes :

#### U.S. Const. :

Art. 1, § 10, Cl. (Interstate Compact Clause) ..	8
Art. II, § 2, Cl. 2 (Appointments Clause) .....	3, 7, 8, 11, 16
Bonneville Project Act of 1937, 16 U.S.C. 832 <i>et seq.</i> .....	2
Federal Water Pollution Control Act, 33 U.S.C. (1976 ed.) 1325 .....	17
National Environmental Policy Act of 1969, 42 U.S.C. 4331 <i>et seq.</i> .....	9
42 U.S.C. 4332 .....	21
42 U.S.C. 4332 (C) (ii) .....	10
Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 <i>et seq.</i> :	
16 U.S.C. 839-839h .....	2
16 U.S.C. 839b (a) .....	3



# IV

## Constitution and statutes—Continued: Page

16 U.S.C. 839b(a) (1) (A) .....	4
16 U.S.C. 839b(a) (2) .....	14
16 U.S.C. 839b(a) (2) (A) (iv) .....	3, 17, 21
16 U.S.C. 839b(a) (3) .....	3
16 U.S.C. 839b(a) (4) .....	21
16 U.S.C. 839b(b) .....	15
16 U.S.C. 839b(b) (1) .....	4
16 U.S.C. 839b(b) (1) (B) .....	3
16 U.S.C. 839b(b) (2) .....	4
16 U.S.C. 839b(d) .....	4
16 U.S.C. 839b(d) (2) .....	4
16 U.S.C. 839b(e) (1) .....	5
16 U.S.C. 839b(e) (2) .....	4
16 U.S.C. 839b(e) (3) (A) .....	5
16 U.S.C. 839b(f) (1) .....	5, 18
16 U.S.C. 839b(f) (2) .....	6, 15, 16
16 U.S.C. 839c(d) (3) .....	4, 17
16 U.S.C. 839d .....	4
16 U.S.C. 839d(a) .....	5
16 U.S.C. 839d(c) .....	4, 17, 18
16 U.S.C. 839f(e) (1) .....	7
16 U.S.C. 839f(e) (5) .....	7
16 U.S.C. 839g(a) .....	15
16 U.S.C. 1456(c) (3) (A) .....	17
28 U.S.C. 2403(a) .....	7

## Miscellaneous:

126 Cong. Rec. 29258 (1980) .....	16
2 M. Farrand, <i>The Records of the Federal Convention of 1787</i> (rev. ed. 1966) .....	12
48 Fed. Reg. 24443 (1983) .....	6
51 Fed. Reg. (1986):	
p. 7364 .....	6
p. 16239 .....	6
p. 42028 .....	18
p. 42031 .....	20
p. 42902 .....	18

**In the Supreme Court of the United States**

OCTOBER TERM, 1986

---

No. 86-629

SEATTLE MASTER BUILDERS  
ASSOCIATION, ET AL., PETITIONERS

*v.*

PACIFIC NORTHWEST ELECTRIC POWER AND  
CONSERVATION PLANNING COUNCIL, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**OPINION BELOW**

The opinion of the court of appeals (Pet. App. A1-A79) is reported at 786 F.2d 1359.

**JURISDICTION**

The judgment of the court of appeals was entered on April 10, 1986, and the petition for rehearing was denied on July 8, 1986. The petition for a writ of certiorari was filed on October 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## STATEMENT

1. The Bonneville Power Administration (BPA) is a federal agency within the United States Department of Energy. Since 1937, BPA has been responsible for the marketing at wholesale of electricity generated by federal hydroelectric projects in the Columbia River Basin. 16 U.S.C. 832 *et seq.* For many years, BPA provided an ample source of electrical energy for numerous public and private utilities, other government agencies, and direct-service industrial customers (principally aluminum companies). By the 1970's, however, it appeared to many in the Pacific Northwest that BPA was approaching the limits of its ability to meet expanding load growth and that some system was required for the allocation of power among BPA's existing and potential customers. See *Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380, 382-386 (1984).

Congress responded in 1980 by enacting the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. 839-839h. "The Act provided for future cooperation in the region by establishing a mechanism for comprehensive federal-state power planning. For the first time, moreover, BPA was authorized to acquire resources to increase the supply of federal power." *Central Lincoln*, 467 U.S. at 386 (citations and footnote omitted).<sup>1</sup> To assist BPA in its expanded plan-

---

<sup>1</sup> "Under the [Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.*], BPA did not have authority to own, construct, or purchase the output or capability of electricity generating plants except to meet short-term deficiencies; BPA was entirely a marketing agency that disposed of power generated at dams constructed by the Army Corps of Engineers and

ning and acquisition responsibilities, and to provide for cooperation between BPA and the four States that cover most of BPA's service area (Oregon, Washington, Montana and Idaho), Congress gave its consent to an agreement among those States for the establishment of a "regional agency" known as the Pacific Northwest Electric Power and Conservation Planning Council (the Council). 16 U.S.C. 839b(a). The Council is composed of eight members, with two members appointed by the Governor of each of the four affected States. The Northwest Power Act provided that the appointment of six members from at least three of the four States by June 30, 1981—six months after the Act was signed into law—"shall constitute an agreement by the States" (*ibid.*). The legislature of each of the four States enacted a law authorizing its Governor to appoint two members of the Council (Pet. App. A4), and the Council thus came into effect in 1981. The Northwest Power Act states that "[t]he members and officers and employees of the Council shall not be deemed to be officers or employees of the United States for any purpose" (16 U.S.C. 839b(a)(3)) and that except as otherwise provided in the Act, the Council "shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law" (16 U.S.C. 839b(a)(2)(A)(iv)).<sup>2</sup>

---

what was then called the Bureau of Reclamation" (*Central Lincoln*, 467 U.S. at 386 n.5).

<sup>2</sup> Congress anticipated possible constitutional challenges to the Council because its members are appointed by the state Governors, rather than by the President or the head of a federal department, in the manner contemplated by the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. See 16 U.S.C. 839b(b)(1)(B). Accordingly, the Act provides

2. One of the principal responsibilities of the Council is to prepare and transmit to the Administrator of BPA a regional conservation and electric power plan (the Plan). 16 U.S.C. 839b(a)(1)(A) and (d). The Plan must set forth a general scheme for implementing conservation measures and developing resources in order to reduce or meet the Administrator's obligations to satisfy the projected demand for power in the region, with due regard for environmental quality, compatibility with the existing regional power system, and protection of fish and wildlife. 16 U.S.C. 839b(e)(2). The Act provides that following the adoption of the Plan, all actions of the Administrator of BPA concerning resource acquisition (see 16 U.S.C. 839d) shall be consistent with the plan, except as otherwise provided in the Act. 16 U.S.C. 839b(d)(2).<sup>3</sup>

---

that if any provision of the Act relating to the establishment of the Council or to any substantial function or responsibility of the Council is held by a final decision of a federal court to be unlawful, or if the regional conservation and electric power plan (see pages 4-5, *infra*) is held to be ineffective because of the manner in which the members are appointed, the Secretary of Energy shall establish the Council as a federal agency. In that event, the members of the Council would be appointed by the Secretary, upon the recommendation of the Governors. 16 U.S.C. 839b(b)(1) and (2).

<sup>3</sup> The Act contains several other provisions regarding the relationship between the Council and BPA. For example, 16 U.S.C. 839d(c) prescribes elaborate procedures to insure that any major energy resources (including conservation measures) that the Administrator of BPA proposes to acquire are consistent with the Council's Plan. Similarly, 16 U.S.C. 839c(d)(3) provides that the Administrator may not make additional sales of power to direct-service industrial customers without the approval of the Council. These two provisions appear to give the state-appointed Council a veto au-

In identifying resources to meet future power needs, the Plan must give priority first to conservation, then to renewable resources and certain efficient generating methods, and finally to other resources. 16 U.S.C. 839b(e) (1). The Plan must also contain an energy conservation program, which in turn must include model conservation standards (MCS). 16 U.S.C. 839b(e) (3) (A). The purpose of the MCS is to reduce the future need for new generating capacity by encouraging more energy-efficient building practices in the region. The MCS must include standards for new and existing structures; conservation programs by utilities, customers, and governmental entities; and other consumer actions for achieving conservation. In addition, the MCS "shall reflect geographic and climatic differences within the region" and "shall be designed to produce all power savings that are cost-effective for the region and economically feasible for consumers," taking into account financial assistance available to consumers under 16 U.S.C. 839d(a), (839b(f) (1)).

To assure broad participation in the development of the MCS, the Council must consult with the Administrator of BPA and his customers, the four Northwest States, their political subdivisions, and the public. 16 U.S.C. 839b(f) (1). However, the Northwest Power Act does not provide any means by which the Council may directly impose the MCS on state or local governments or the builders or owners of structures. Congress's expectation, rather, was that the MCS would be regarded as consensus standards that would be enacted into law by the state and local governments in the region and be followed by BPA's

---

thority over the actions of the Administrator in some circumstances. These provisions are not involved in this case.



utility and other customers. But in order to furnish an incentive to that end, the Act provides that the Council may "recommend" to the Administrator of BPA—and that the Administrator thereafter "may" impose—a surcharge on the rates charged to customers within States or political subdivisions that have not (or to BPA customers that have not) implemented conservation measures that achieve energy savings comparable to those attainable under the MCS. 16 U.S.C. 839b(f)(2). The Council recommended such a surcharge to the Administrator in 1983 and in 1985, but none has yet been imposed. See page 20, *infra*.

3. The Council promulgated model conservation standards as part of its 1983 Conservation and Electric Power Plan. 48 Fed. Reg. 24443 (excerpted at Pet. App. M1-M148). The standards for new residential construction, at issue here, consisted of a table that specified the maximum number of kilowatt hours per square foot required to heat single and multi-family buildings in different climate zones in the region (*id.* at M60-M61). The Plan stated that these thermal performance goals could be met by any means or combination of conservation measures, such as greater insulation, solar design, or geothermal heat (*id.* at M61). A technical appendix to the Plan offered a number of suggested approaches to achieving these goals, such as wall and ceiling insulation, glazing limitations, etc. (*id.* at M63-M64, N1-N4).<sup>4</sup>

4. a. Petitioners, a consortium of construction industry interests, challenged the 1983 MCS for new

---

<sup>4</sup> On December 4, 1985, the Council adopted certain amendments to the MCS, which were later incorporated into the 1986 amendments to the Plan. 51 Fed. Reg. 7364, 16239 (1986).



residential construction by filing a petition for review in the United States Court of Appeals for the Ninth Circuit, pursuant to 16 U.S.C. 839f(e) (1) and (5). They argued, *inter alia*, that the Council exercises substantial authority over the Administrator of BPA under federal law and that its members therefore must be appointed by the President or the head of a federal department, as required by the Appointments Clause of the Constitution (Art. II, § 2, Cl. 2), and cannot be appointed by the four Governors.

Because the constitutionality of an Act of Congress had been called into question, the United States intervened in the court of appeals pursuant to 28 U.S.C. 2403(a). The United States took the position that the court of appeals need not decide whether the Council as currently constituted may exercise all of the powers assigned to it by the Northwest Power Act, including those that appear to give the Council a veto over some actions of the Administrator of BPA. See note 3, *supra*. All that is involved in this case, the United States argued, is whether the Appointments Clause bars the state-appointed Council from issuing the MCS. Because the MCS do not have any binding legal effect in their own right—but serve merely as recommended standards for state and local governments and as the basis for a surcharge recommendation to the Administrator—the United States argued that the MCS properly could be issued by a body appointed by state governors.

b. A divided panel of the court of appeals rejected petitioners' Appointments Clause challenge and sustained the MCS (Pet. App. A1-A79). In addressing the constitutional issue, the court declined the United States' suggestion that it limit its discussion to the issuance of the MCS, the only power of the Council that was before the court.

The court of appeals first held that the agreement among the States authorized by the Northwest Power Act is within the scope of the Interstate Compact Clause of the Constitution (Art. I, § 10, Cl. 3) and that the Council therefore is a validly created interstate-compact entity, even though Congress largely dictated the terms of the States' participation and the Council's actions may directly affect BPA, a federal agency. The court observed that this Court has sustained the power of Congress to consent in advance to an interstate compact and to condition its consent on the States' compliance with specified terms (Pet. App. A12-A13, citing *Cuyler v. Adams*, 449 U.S. 433, 439-441 (1981)). The court also reasoned that it is not unusual for the federal government to be involved in or affected by an interstate compact (Pet. App. A13-A14), and that there is no constitutional prohibition against Congress's providing that a federal agency must adhere to requirements imposed by a state agency—or, accordingly, by an *interstate* agency created by compact (*id.* at A14-A15, citing *California v. United States*, 438 U.S. 645, 656-657 (1978)).

The court of appeals also rejected petitioners' argument that, even if the Northwest Power Act does authorize a valid interstate compact, the Council's members must be appointed in conformity with the Appointments Clause (Pet. App. A62-A79). In ~~his~~<sup>the</sup> court's view, the Appointments Clause applies to (i) "all executive or administrative officers," (ii) who "serve pursuant to federal law," and (iii) who "exercise significant authority over federal government actions" (*id.* at A16, A17, citing *Buckley v. Valeo*, 424 U.S. 1, 123-127 (1976)). The court did not decide whether the first and third prongs of this

test were satisfied, because it found the Appointments Clause inapplicable to the Council under the second prong. The court reasoned that although federal law provides the necessary congressional consent for creation of the Council, constrains the Council's policy-making, and subjects its operations to some federal laws, "[t]he Council members do not perform their duties 'pursuant to laws of the United States'" (Pet. App. A17, quoting *Buckley v. Valeo*, 424 U.S. at 126), but rather serve pursuant to the state laws that provide for their appointment (Pet. App. A17-A19). The court also expressed the view that the Appointments Clause is addressed only to the separation of powers between the President and Congress, not between the Executive Branch and the States, and that no aggrandizement of Congress's powers is involved here because Congress neither appoints nor removes the members of the Council (*id.* at A16, A19-A20).

With respect to the statutory issues, the court of appeals held that the MCS are consistent with the requirements of the Northwest Power Act that the MCS be "cost-effective for the region" and "economically feasible for consumers" (Pet. App. A21-A44). The court also rejected petitioners' contention that the Council was required to comply with the environmental assessment statutes of each of the four participating States (*id.* at A44-A45). Similarly, the court held that the Council had not violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4331 *et seq.*, when it issued the MCS. Without deciding whether federal environmental statutes apply to the Council, the court concluded that neither the Council nor BPA had taken any major federal action significantly affecting the quality of the human environment that would trigger the NEPA requirement

that an environmental impact statement be prepared. Pet. App. A45-A46; see 42 U.S.C. 4332(C) (ii).

c. Judge Beezer dissented (Pet. App. A46-A79). Judge Beezer first concluded that the Council is a federal agency, not a bona fide interstate compact entity. He relied on three factors: (i) the States did not make an irrevocable commitment to the Council or condition their participation on the participation of the other States (*id.* at A51-A52, citing *Northeast Bancorp, Inc. v. Board of Governors*, No. 84-363 (June 10, 1985), slip op. 14-15); (ii) the Council's responsibilities extend to the entire BPA "region," including any of the four States that might have chosen not to participate as well as parts of other States (Nevada, Utah, Wyoming, and California) that are served by BPA (Pet. App. A52-A53); and (iii) the Council's sole function is to oversee the actions of a federal agency, rather than to coordinate energy and conservation planning at the state level (*id.* at A53-A57).

Judge Beezer further concluded that the validity of the members' appointment must be evaluated under the Appointments Clause even if the Council is a valid interstate compact entity. To allow Congress to vest substantive appointment authority in third parties, he reasoned, would enhance congressional authority at the expense of the Executive. Pet. App. A57-A62. In this case, Judge Beezer concluded that the Council as currently constituted does violate the Appointments Clause (Pet. App. A62-A79). In his view, under *Buckley v. Valeo, supra*, the Appointments Clause applies to any appointee "exercising significant authority pursuant to the laws of the United States," whether or not the person has been formally designated by Congress as an Officer of the

United States (Pet. App. A63-A64, quoting 424 U.S. at 125-126). Judge Beezer believed that the Council members do exercise such "significant authority," because the Administrator of BPA must act in a manner consistent with the Council's Plan and because the Council may block the acquisition of major power resources that are inconsistent with the Plan and disapprove additional sales to direct-service industrial customers (Pet. App. A64-A69).

### ARGUMENT

The court of appeals correctly sustained the authority of the Pacific Northwest Electric Power and Conservation Planning Council, as presently constituted, to prepare and issue the model conservation standards provided for under the Northwest Power Act. Those standards are merely recommendatory, and they accordingly may be developed and issued by a body whose members are not appointed in the manner prescribed by the Appointments Clause of the Constitution. Although the opinion of the court of appeals contains language that appears to affirm the authority of the state-appointed Council to take other actions that would have a binding effect on the Administrator of BPA, those other powers of the Council are not involved in this case and it therefore was unnecessary for the court of appeals to address them.

The judgment below sustaining the model conservation standards and the Council's constitutional authority to issue them does not conflict with any decision of this Court or another court of appeals. Moreover, the Council, in response to a request by the Administrator, recently published a proposal to amend the model conservation standards in order to ensure that they meet the Act's cost-effectiveness and economic feasibility standards. Any amendments adopted

by the Council may moot some or all of petitioners' objections to the particular standards that were before the court of appeals. Especially in these changed circumstances, review by this Court is not warranted.

1. Petitioners contend (Pet. 11-20) that under the Appointments Clause of the Constitution, a body composed of members appointed by state governors cannot control a federal agency's execution of the laws. Accordingly, petitioners argue that the Council cannot perform *any* of the powers contemplated by the Northwest Power Act, including the issuance of the MCS. We disagree with petitioners as regards the issuance of the MCS, which is the only power of the Council that is involved in this case.

a. A federal law establishing a state-appointed council and authorizing it to take binding action to implement that federal law and to overrule the official actions of an Officer of the United States raises substantial constitutional questions. As petitioners stress (Pet. 15-16), the Constitutional Convention rejected a proposal that would have permitted Congress to vest in the governors of the several States the authority to appoint federal officers. 2 M Farrand, *The Records of the Federal Convention of 1787*, at 406, 407, 419 (rev. ed. 1966). Gouverneur Morris objected to that proposal because "[t]his would be putting it in the power of the States to say, 'You shall be viceroys but we will be viceroys over you'" (*id.* at 406).<sup>5</sup>

---

<sup>5</sup> Before the motion was defeated, the Constitutional Convention deleted by consent a provision permitting the appointment power to be vested in the legislatures of the States, on the ground that "[i]f this be agreed to it will soon be a standing instruction from the State Legislatures to pass no law creating offices, unless the [appointments] be referred to them." 2 Farrand, *supra*, at 406.



Compare *Bowsher v. Synar*, No. 85-1377 (July 7, 1986), slip op. 10-11, 14-16. The proposal for state appointment of persons responsible for the execution of federal law was thus viewed by the Framers as inconsistent with the Constitution's division of responsibility between the States and the National Government, with the laws of the latter, administered by the Executive, being supreme. This Court stated in *Buckley v. Valeo*, 424 U.S. 1 (1976), that "any appointee exercising significant authority pursuant to the laws of the United States" is an "Officer of the United States" required to be appointed in accordance with the Appointments Clause (424 U.S. at 126). Although Congress may in some circumstances require that a federal agency follow *state* law in carrying out certain of its functions (see, e.g., *California v. United States*, 438 U.S. at 656-657), the grant to state-appointed persons of the power under *federal* law to veto the actions of an Officer of the United States may constitute the creation of federal officers in a manner that violates the Appointments Clause or an improper grant of federal executive power to persons who are not federal officers and therefore may not exercise such power.

b. The matter is further complicated as regards the Council by the question whether the method of its establishment properly constituted an interstate compact, such that the requirement that the Administrator respect the exercise of a veto by the Council might be analogized to subjecting the operation of a federal program to state law, as in *California v. United States*, *supra*. In the Northwest Power Act, Congress gave its consent to an agreement under which the Council would be established and its members would be appointed by the Governors of the four



Northwest States. 16 U.S.C. 839b(a)(2). Congress specified that the appointment of six initial members from at least three States by June 30, 1981 would constitute an agreement among those States (16 U.S.C. 839b(a)(2)). The four States then appointed the members by that deadline, thereby manifesting their assent in the manner specified by Congress.

On the other hand, the Council has a number of attributes that, especially when considered in combination, distinguish the Northwest Power Act from the typical interstate compact. First, the terms of the "agreement" were not the subject of negotiations among the participating States, such that the Council could be said to be the product of an independent meeting of the minds among contracting sovereigns. Instead, the Council's basic charter and the substantive and procedural standards by which it must operate were dictated in considerable detail by Congress itself in the Northwest Power Act.<sup>6</sup> Second, as Judge Beezer pointed out (Pet. App. A53-A57), in those areas in which its actions have independent legal force, the Council's sole function is to affect and in some circumstances veto the actions of a federal agency, BPA. By contrast, the Council does not have power to bind the four States in the administration of their own laws or to impose obligations directly on private persons in those geographic or subject-matter areas in which the four States have inherent but overlapping responsibilities—the circumstances

---

<sup>6</sup> The notion that the Council reflects an independent agreement among the States is further undermined by the fact that Congress specified that the appointment of Council members by at least three States would be deemed to constitute an agreement—a condition that could be satisfied by each State acting alone, rather than reciprocally. Compare *Northeast Bancorp, Inc. v. Board of Governors*, slip op. 14.

of traditional state concern that the Framers presumably contemplated would be the subject of the interstate compacts to which Congress might consent under the Constitution. Third, Congress confirmed the similarity between the Council and a federal agency by including a fallback mechanism under which the Secretary of Energy may appoint the members of the Council, who would then have precisely the same powers, if the States failed to appoint members at the outset or if that method of appointment were later held unconstitutional. 16 U.S.C. 839b(b). Compare *Bowsher v. Synar*, slip op. 19-20; *id.* at 15-16 (Stevens, J., concurring in the judgment).

c. For the foregoing reasons, the validity of some of the Council's powers presents novel and difficult constitutional questions. However, there is no occasion in this case to consider those questions. All that is involved here is the authority of the Council to issue the model conservation standards.

As petitioners concede (Pet. 6), nothing in the Northwest Power Act gives the Council authority to impose the MCS on state or local governments (see 16 U.S.C. 839g(a)) or on private persons. Nor do the MCS have a binding effect on the Federal Government. The Administrator of BPA is under no statutory obligation to adopt, approve, or enforce the MCS developed by the Council. The only "enforcement" mechanism related to the MCS is contained in 16 U.S.C. 839b(f)(2). That section authorizes the Council only to *recommend* that the Administrator impose surcharges on BPA customers within the jurisdictions of state or local governments that have not (or on customers that themselves have not) implemented conservation measures that achieve savings comparable to those attainable under the MCS.

The Act further provides that “the Administrator *may* \* \* \* impose such a surcharge” (16 U.S.C. 839b (f) (2) (emphasis added)), thereby preserving to the Administrator the discretion to accept or reject the Council’s recommendation.

Indeed, during congressional consideration of the Act, Representative Markey proposed an amendment that would have required the Administrator to impose the MCS surcharges recommended by the Council. But that amendment was defeated following the opposition of Representative Dingell, who stated (126 Cong. Rec. 29258 (1980)).

This change would raise constitutional problems because the council is a State agency. \* \* \* A State agency cannot, under the Constitution, require a Federal agency to take action of this nature. The provision would change that so that we would clearly have then an unconstitutional and undesirable result.

Congress’s omission of any provision for giving binding effect to the Council’s surcharge recommendation thus was quite deliberate.

By contrast, Congress’s vesting of authority in a body composed of state-appointed members to make mere recommendations to a federal agency such as BPA does not raise constitutional problems under the Appointments Clause. In *Buckley v. Valeo*, the Court held that the power to receive, index and audit reports pertaining to federal elections—powers “essentially of an investigative and informative nature” (424 U.S. at 137)—could constitutionally be exercised by a Federal Election Commission that included members who were appointed by the Legislative Branch and who therefore did not serve in conformity with the Appointments Clause. Such pow-

ers, the Court reasoned, could even be delegated to a committee of Congress itself, in aid of its legislative functions. 424 U.S. at 137-138. The Council's powers involved in this case are to study possible conservation measures and to report its conclusions to the state and local governments, consumers of electric power, and the Administrator of BPA. While the state-appointed Council, which Congress specified "shall not be considered an agency \* \* \* of the United States" (16 U.S.C. 839b(a)(2)(A)(iv)), may present somewhat different issues than an improperly appointed federal commission, the Council's functions with respect to the issuance of the MCS are in "an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not 'Officers of the United States'" (*Buckley v. Valeo*, 424 U.S. at 139), including persons appointed to office by state governors.<sup>7</sup> Compare 16 U.S.C. 1456(c)(3)(A) (state agency may interpose objection to federal permit for activity affecting land or water use in the coastal zone).

d. The Northwest Power Act does contain several other provisions that appear to vest the Council with authority that goes beyond merely making recommendations to the Administrator. In particular, the Council is granted an effective veto over increased sales of power by the Administrator to direct-service industrial customers (16 U.S.C. 839c(d)(3)) and over the acquisition by the Administrator of new power resources (16 U.S.C. 839d(c)). These provisions are not at issue in this case, and petitioners

---

<sup>7</sup> A contrary conclusion would call into question the ability of Congress to establish a study commission having members appointed by Congress as well as the President. See, e.g., 33 U.S.C. (1976 ed.) 1325 (National Study Commission under Federal Water Pollution Control Act).

do not have standing to challenge them. Petitioners are neither industrial customers seeking to purchase additional power from the Administrator in the face of disapproval by the Council, nor sponsors of a new generating or conservation resource that the Administrator would acquire but for a "veto" by the Council.

In fact, the Council has not yet sought to invoke these two statutory provisions in any context, and it is speculative whether the Council will ever do so. In view of the depressed state of the aluminium industry in the Pacific Northeast, it is unlikely that any existing direct-service industrial customer will seek to acquire additional power from the Administrator in the foreseeable future; and in view of BPA's projected power surplus and declining revenue base, it is unlikely that the Council would disapprove such a proposal. Moreover, the Administrator and the Council recently reached agreement concerning the types of power resources or conservation measures that must be submitted to the review process under 16 U.S.C. 839d(c) (see 51 Fed. Reg. 42028, 42902 (1986)), which should reduce the potential for disputes about whether the Administrator can acquire particular resources in the future. But however events might unfold, there is no occasion now for this Court to address the constitutionality of these statutory provisions, in the absence of a concrete controversy about their application.

2. Petitioners also argue (Pet. 24-30) that the MCS at issue here are invalid as a statutory matter because the Council applied an erroneous interpretation of the requirement in 16 U.S.C. 839b(f)(1) that the MCS must be "economically feasible for consumers." The United States did not take a position on this and other non-constitutional issues in the



court of appeals, and we accordingly do not discuss the merits of the statutory validity of the MCS here. We do suggest, however, that this issue, which arises only under the Northwest Power Act and affects only the four States in the Pacific Northwest, does not warrant review by this Court. That is especially so in light of developments since the court of appeals rendered its decision—developments that also weigh against review at this time of the Appointments Clause issue petitioners raise.

In 1986, in response to the Council's 1985 revision of the MCS (see note 4, *supra*), BPA initiated an independent evaluation of the Council's suggested MCS "packages." In performing this analysis, BPA utilized empirical data from its Residential Standards Demonstration Program. These data, which consist in large part of thermal performance observations of homes built to the Council's suggested MCS specifications, were unavailable to the Council and the court of appeals when they considered the particular version of the MCS now before the Court.

On October 2, 1986, BPA released for public review a technical paper containing the findings of its study. As relevant here, those findings are: (i) that the thermal performance goals reflected in the MCS are attainable in a manner that satisfies the statutory requirements of cost-effectiveness and economic feasibility; (ii) that the particular packages of measures suggested by the Council for achieving the MCS thermal performance goals do not entirely meet the the statutory criterion of cost-effectiveness; and (iii) that other, slightly different packages for the several climatic zones in the region would meet the statutory requirements at a lower cost. In particular, BPA found that the most expensive measures suggested by the Council, and the ones most objectionable to petitioners—the air infiltration package—could be

deleted and replaced with less expensive measures, which would still achieve the Council's desired thermal performance levels. Moreover, under the new MCS specifications advanced by BPA, *each* measure satisfies the cost-effectiveness criterion, which eliminates one of petitioners' principal objections in the court of appeals (Pet. App. A34-A35). In fact, under the new MCS packages developed by BPA, present value costs for new homes are (with only minor exceptions) the same as or less than the costs of comparable homes built to existing standards.

In response to BPA's announcement, the Council voted on November 13, 1986 to offer for public comment proposed amendments to the MCS based on BPA's findings. See 51 Fed. Reg. 42031 (1986). On November 18, 1986, the Administrator of BPA sent a letter to BPA's customers informing them that "no Surcharge Policy will be finalized until after the Council completes [its] rulemaking process."<sup>8</sup> In light of these developments, there is not a substantial and concrete controversy regarding the particular MCS that are now before the Court, even assuming that the question of the validity of the MCS might warrant review in an appropriate case.<sup>9</sup>

---

<sup>8</sup> We have lodged with the Clerk of this Court a copy of the Administrator's letter and the technical paper released by BPA on October 2, 1986.

<sup>9</sup> Petitioners also object (Pet. 21-24) to the Council's failure to prepare an environmental impact statement (EIS), pursuant to either state or federal law, when it issued the MCS. In our view, the court of appeals' conclusion that the environmental laws of the four States do not apply to the Council's preparation of the MCS (Pet. App. A44-A45) reflects a reasonable interpretation of the Northwest Power Act, especially in light of the failure of the States to reserve the right to apply their environmental statutes when they agreed to formation of the Council and the potential burden that would be



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED  
*Solicitor General*

RICHARD K. WILLARD  
*Assistant Attorney General*

JAMES M. SPEARS  
*Deputy Assistant Attorney General*

WILLIAM KANTER

HARVARD P. SPIGAL  
*General Counsel*

ROBERT V. ZENER  
*Attorneys*

JAMES O. LUCE  
*Assistant General Counsel*

L. RANDALL WEISBERG  
*Attorney*  
*Bonneville Power Administration*

DECEMBER 1986

imposed on the Council if it were required to comply with the perhaps divergent laws of several States in preparing a region-wide plan.

We also agree with the court of appeals that no EIS was required under NEPA (Pet. App. A45-A46). That aspect of NEPA applies only to the actions of "agencies of the Federal Government" (42 U.S.C. 4332). Congress expressly mandated that, except as otherwise provided in the Northwest Power Act, the Council "shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law" (16 U.S.C. 839b(a)(2)(A)(iv)), and NEPA is not among the federal laws that Congress made applicable to the Council under the Northwest Power Act (see 16 U.S.C. 839b(a)(4)). Moreover, as the court of appeals concluded (Pet. App. A45-A46), the MCS do not have a significant impact on the quality of the human environment, because they are only proposals, upon which the Administrator may or may not base a rate surcharge.

Supreme Court  
**FILED**

**DEC 27 1986**

JOSEPH F. SPANIOLO, JR.  
CLERK

(8)  
No. 86-629

IN THE  
**Supreme Court of the United States**

October Term, 1986

SEATTLE MASTER BUILDERS ASSOCIATION, *et al.*,

*Petitioners,*

vs.

NORTHWEST POWER PLANNING COUNCIL,

*Respondent,*

UNITED STATES OF AMERICA,

*Intervenor-Respondent.*

On Petition For A Writ of Certiorari To The  
United States Court of Appeals For The Ninth Circuit

**BRIEF OF THE PACIFIC NORTHWEST ELECTRIC  
POWER AND CONSERVATION PLANNING COUNCIL  
IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

JOHN M. VOLKMAN  
JANET C. HANSON  
WILLIAM E. HANNAFORD  
Northwest Power Planning  
Council  
850 S.W. Broadway  
Portland, Oregon 97205  
(503) 222-5161

AARON M. PECK  
MCKENNA, CONNER & CUNEO  
3435 Wilshire Boulevard  
Twenty-Eighth Floor  
Los Angeles, California 90010  
(213) 739-9100

*Attorneys for Northwest Power Planning Council*

*Of Counsel:*

STEPHEN M. SHAPIRO  
MAYER, BROWN & PLATT  
231 South LaSalle Street  
Chicago, Illinois 60604  
(312) 750-3315  
ROGER BEERS  
BEERS & DICKSON  
380 Hayes Street, Suite 1  
San Francisco, California 94102  
(415) 861-1401

FRANK W. OSTRANDER  
24 Peabody Terrace  
Cambridge, Massachusetts 02138  
(617) 547-0230

32/10/2



## QUESTIONS PRESENTED

The Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, 94 Stat. 2697, 16 U.S.C. §§ 839-839h (1980) ("the Act"), authorized the states of the Pacific Northwest region of the United States to form a council, with state-appointed members, to develop and promulgate a plan for the conservation and development of the electric power resources of the region. Pursuant to that authorization, the states of the Pacific Northwest formed a council, the Pacific Northwest Electric Power and Conservation Planning Council, commonly referred to as the "Northwest Power Planning Council" ("the Council"); and the Council developed and promulgated the Northwest Conservation and Electric Power Plan (the "Plan") for such conservation and development, including model conservation standards. The questions presented in this proceeding are as follows:

1. Does the provision of the Act authorizing the formation of the Council by the states of the region and the state appointment of Council members violate the Appointments Clause (Art. II, cl. 2) of the United States Constitution?

2. Should the Plan be set aside on the ground that the Council, in promulgating the Plan, did not comply with state or federal environmental laws?

- a. Should the issue of compliance with federal environmental laws be considered by the Court when it was not raised by Petitioners in the Court of Appeals?

- b. Assuming that the Court should consider the issue of compliance with federal environmental laws, did the Council, in promulgating the Plan, violate either state or federal environmental laws?

3. Did the Council, in developing the Plan, err in its interpretation of the Act's requirement that conservation measures be economically feasible for consumers?

## INDEX

	<u>Page</u>
I. STATEMENT OF THE CASE .....	1
1. The Parties .....	1
2. The Act and Formation of the Council .....	2
3. Mandate to Develop the Plan.....	4
4. Preparation of the Plan.....	5
5. Model Conservation Standards.....	6
6. Proceedings Below .....	7
a. The Majority Opinion .....	8
i. The Council Is an Interstate Compact Agency.....	8
ii. The Method of Appointment of Council Members Does Not Violate the Appointments Clause.....	9
iii. The Plan Does Not Violate The Act .....	10
iv. The Plan Does Not Violate State or Federal En- vironmental Laws.....	10
b. The Dissenting Opinion.....	11
c. The Petitions for Rehearing and Suggestions for Rehearing En Banc.....	12
II. ARGUMENT .....	13
1. The Determination of the Court of Appeals that the Appointment of the Members of the Council by the States of the Pacific Northwest Does Not Violate the Appointments Clause Is Plainly Correct and Does Not Present a Substantial Constitutional Question.....	13
a. The Purpose of the Appointments Clause Is to Maintain a Balance of Power Between the Executive and Legisla- tive Branches of Government and Prevent an Aggran- dizement of Power by the Latter Over the Former. Since the Members of the Council Are Not Appointed or Removable by Congress, No Such Aggrandizement of Power Is Threatened or Even Possible.....	13

	<u>Page</u>
b. The Appointments Clause Applies Only To The Appointment of Federal Officers, and Unless Members of the Council Are Federal Officers the Appointments Clause Could Not Be Applicable to Them. Since Members of the Council Hold Office and Exercise Authority Pursuant to State Law, Obviously They Are Not Federal Officers.....	15
c. The Fact That Federal Law Permits An Appointee to Constrain Federal Power Does Not Transform That Appointee Into A Federal Official For Purposes of the Appointments Clause.....	17
2. Even if the Determination of the Court of Appeals that the Appointment of the Members of the Council By the States of the Pacific Northwest Does Not Violate the Appointments Clause Were Not Plainly Correct, the Grant of Certiorari Would Still Be Inappropriate .....	21
a. The Decision of the Court of Appeals Does Not Conflict with Any Decision of this Court or of Any Other Circuit .....	21
b. This Court Grants Certiorari to Alter Judgments, Not Merely to Revise Opinions. Here the Intended Beneficiary of the Appointments Clause, the Executive Branch of the Federal Government, Has Taken the Position that the Judgment of the Court of Appeals is Correct .....	22
3. The Council, In Promulgating The Plan, Did Not Violate State Or Federal Environmental Laws Because (i) Compact Agencies May Only Be Subjected To State Environmental Laws To The Extent That The Compact So Provides, And The Compact Creating The Council Did Not Provide For The Application Of Such Laws; and (ii) The Federal Environmental Law That Petitioners Contend Is Applicable Applies Only To Federal Agencies And The Act Expressly Provides That The Council Is Not A Federal Agency.....	23
a. No Substantial Issue Is Raised Regarding Compliance With State Environmental Laws .....	23
b. No Substantial Question Is Raised Regarding the Applicability of Federal Environmental Law .....	24

Page

4. The Determination Of The Court Of Appeals That The Plan Does Not Violate The Requirement Of The Act That Conservation Measures Be "Economically Feasible" For Consumers Is Plainly Correct. In Any Event, Whether The Plan Does Or Does Not Violate That Requirement Is An Issue Of Limited Significance That Does Not Merit Review By Certiorari.....	24
III. CONCLUSION.....	25



## TABLE OF AUTHORITIES

## Cases

Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist., 467 U.S. 380 (1984).....	3
Black v. Cutter Laboratories, 351 U.S. 292 (1956).....	22
Bowsher v. Synar, .....U.S. ...., 106 S.Ct. 3181 (1986) ..	14, 15, 21
Buckley v. Valeo, 424 U.S. 1 (1976).....	9, 13
California v. United States, 438 U.S. 645 (1978).....	18
Central Lincoln Peoples' Utility District v. Johnson, 735 F.2d 1101 (9th Cir. 1984) .....	3
Curran v. Wallace, 306 U.S. 1 (1939).....	18
Cuyler v. Adams, 449 U.S. 433 (1981).....	19
Forelaws on Board v. Johnson, 743 F.2d 677 (9th Cir. 1984), cert. denied, ..... U.S. ...., 106 S.Ct. 3293 (1986).....	3
Hancock v. Train, 426 U.S. 167 (1976).....	18
Herb v. Pitcairn, 324 U.S. 117 (1945).....	22
Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983).....	14
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).....	22
Opp Cotton Mills, Inc. v. Administrator, etc., 312 U.S. 126 (1941).....	18
People v. South Lake Tahoe, 466 F.Supp. 527 (E.D. Cal. 1978) .....	20, 23
Public Power Council v. Johnson, 674 F.2d 791 (9th Cir. 1982)	3
St. Louis Iron Mountain & Southern Ry. Co. v. Taylor, 210 U.S. 281 (1908) .....	18
Selective Draft Law Cases, 245 U.S. 366 (1918) .....	18
United States v. Rock Royal Co-Operative, Inc., 307 U.S. 533 (1939).....	18
United States Steel Corp. v. Multistate Tax Com'n, 434 U.S. 452 (1978) .....	19
Virginia v. Tennessee, 148 U.S. 503 (1893) .....	19

## Statutes, Rules and Regulations

United States Constitution Art. I.....	i, 8, 18
United States Constitution Art. II, Cl. 2 .....	i, 7, 9, 13 <i>et seq.</i>
United States Constitution Art. III.....	22
45 Stat. 1062, 43 U.S.C. § 7g ["Boulder Canyon Project Act of 1928"] .....	19
50 Stat. 246, 7 U.S.C. § 601, <i>et seq.</i> ["Agricultural Marketing Agreement Act of 1937"] .....	18
70 Stat. 110, 43 U.S.C. § 620m ["Upper Colorado River Compact Act"] .....	19
16 U.S.C. § 839b(a)(2) .....	4
16 U.S.C. § 839b(a)(3).....	4, 14
16 U.S.C. § 839b(a)(2)(A) .....	24
16 U.S.C. § 839b(a)(2)(B).....	14

	<u>Page</u>
16 U.S.C. § 839b(b) .....	4
16 U.S.C. § 839b(d)(1) .....	5
16 U.S.C. § 839b(e)(2) .....	5
16 U.S.C. § 839b(f)(1) .....	6
16 U.S.C. § 839b(h)(12)(A) .....	14
16 U.S.C. § 839f(e)(5) .....	7
42 U.S.C. § 4332(2)(C) .....	24
Pub.L. No. 87-328, § 11.1(b), 75 Stat. 688 (1961) ["Delaware River Basin Compact"] .....	19
Pub.L. No. 91-575, § 12.1, 84 Stat. 1509 (1970) ["Susquehanna River Basin Compact"] .....	19
Pub.L. No. 96-501, 94 Stat. 2697, 16 U.S.C. §§ 839-839h (1980) [Pacific Northwest Electric Power Planning and Conservation Act ("the Act")] .....	i, et seq.
50 Fed. Reg. 5021, Feb. 5, 1985 .....	6
50 Fed. Reg. 30654, Jul. 26, 1985 .....	6
50 Fed. Reg. 40091, Oct. 1, 1985 .....	6
51 Fed. Reg. 7364, Mar. 3, 1986 .....	6
51 Fed. Reg. 16239, May 1, 1986 .....	6
51 Fed. Reg. 42031, Nov. 20, 1986 .....	6
51 Fed. Reg. 42033, Nov. 20, 1986 .....	25
126 Con. Rec. 30181 .....	16
H.R. Rep. No. 976 (Pt. I), 1980 U.S. Code Cong. & Adm. News 5992-5993 .....	3
H.R. Rep. No. 976 (Pt. II), 1980 U.S. Code Cong. & Adm. News 6038 .....	4, 16
Idaho Code § 61-1201, et seq. (Supp. 1984) .....	4, 23
Mont. Code Ann., 75-1-201 (1983) .....	23-24
Mont. Code Ann. § 90-4-401 et seq. (1983) .....	4, 23
Or. Rev. Stat., § 469.800 et seq. (1983) .....	4, 23
Wash. Rev. Code, § 43.52A.010 et seq. (1983) .....	4, 23
Wash. Rev. Code, § 43.19.504(1) .....	23
Wash. Rev. Code, § 43.21C.030-31 .....	23

#### Other Authorities

Frankfurter & Landis, <i>The Compact Clause of the Constitution</i> — <i>A Study in Interstate Adjustments</i> , 34 Yale L.J. 685 (1925) .....	20
Tribe, <i>Constitutional Choices</i> , 72 (1985) .....	17

No. 86-629

---

IN THE  
**Supreme Court of the United States**

---

October Term, 1986

---

SEATTLE MASTER BUILDERS ASSOCIATION, *et al.*,

*Petitioners,*

vs.

NORTHWEST POWER PLANNING COUNCIL,

*Respondent,*

UNITED STATES OF AMERICA,

*Intervenor-Respondent.*

---

On Petition For A Writ of Certiorari To The  
United States Court of Appeals For The Ninth Circuit

---

**BRIEF OF THE PACIFIC NORTHWEST ELECTRIC  
POWER AND CONSERVATION PLANNING COUNCIL  
IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

---

I.

**STATEMENT OF THE CASE**

**1. The Parties.**

The Petitioners in this proceeding are certain trade associations for members of, and members of, the residential real estate development industry in the Pacific Northwest.<sup>1</sup>

---

<sup>1</sup>The Petitioners are Seattle Master Builders Association, Homebuilders Association of Spokane, Inc., National Woodwork Manufacturers' Association, Fir & Hemlock Door Association, Shelter Development Corporation, Clair W. Daines, Inc., Conner Development Company, Donald N. McDonald, Seattle Door Company, Inc., and Homebuilders Association of Washington State (collectively, "Petitioners").

One of the Respondents in this proceeding, the Council, is an agency formed by the states of the Pacific Northwest pursuant to the compact clause of the U.S. Constitution, responsible for adopting a regional conservation and electric power plan for the Pacific Northwest. The other respondent is the United States of America ("the United States").

## 2. The Act and Formation of the Council.

While the electric power needs of the Pacific Northwest had historically been satisfied largely by federal agencies, the state governments of the region also wanted to play a role in, and influence the course of, Pacific Northwest electric power development.<sup>2</sup> Accordingly, in an effort to deal with the problem of electric energy demands that the existing hydropower-based system could not satisfy, Congress enacted the Act.<sup>3</sup>

<sup>2</sup> See, e.g., *Pacific Northwest Electric Power Supply and Conservation Act, 1979: Hearing on S. 2080 Before the Comm. on Energy and Natural Resources, 95th Cong., 2d Sess. 523-28, 626-42 (1978)* (statements of Governor Judge of Montana and Governor Evans of Idaho concerning the desirability of state energy councils.)

<sup>3</sup> The problem of electric power shortages, which the Act was designed to address, was pressing. As the legislative history of the Act explained:

"Coupled with conservation's economic promise is the urgent need to conserve to ease the region's almost certain power shortages in the 1980's. Current forecasts indicate that the Northwest will experience massive power shortages during any critical water year in the next decade \* \* \*. Although it is too late to avert such shortages by building new thermal plants it is not too late to reduce the incidence and duration of such shortages through conservation. In the absence of a coordinated regional power program, it is probable that conservation efforts in the region will be too slow, too scattered, and too modest to be effective.

\* \* \*

"The hearings also demonstrated that a legislative solution to the region's electric power planning problems was imperative. The certain inability of the region otherwise to resolve its problems without legislation represents a serious economic, social, and environmental threat to the region and, by implication, to other regions of the

(footnote continued on next page)

Under the Act, the federal government continues to play a significant — and, in fact, expanded — role in satisfying the electric power needs of the Pacific Northwest. For the first time, the Bonneville Power Administration (“BPA”) was vested with authority to acquire the output of electric generating resources. At the same time, Congress authorized the states of the Pacific Northwest to form a compact agency for various purposes related to meeting the electric energy needs of the Pacific Northwest. That agency is the Council.

In the section dealing with the creation of the Council, the Act provided that “the consent of Congress is given for an agreement” among the states of Idaho, Montana, Oregon and Washington “pursuant to which . . . there shall be established a regional agency known as the ‘Pacific Northwest Electric Power and Conservation Planning Council’ which . . . shall carry out its functions and responsibilities in accordance with” the Act. The Act also states that “except as otherwise provided” in the Act, the agency “shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law;” that “two persons from each State may be appointed, subject to the applicable laws of each such State, to undertake the functions and duties of members” of the agency; and that “[t]he members and officers and employees of the . . .

---

(footnote continued from preceding page)

country. The continued failure to use existing resources and conservation effectively and to plan efficiently for future needs raises the potential of severe regional electric power shortages in this decade . . .” (H.R. Rep. No. 976 (Pt. I), 1980 U.S. Code Cong. & Adm. News 5992-5993.) The importance of the Act in meeting the electric power needs of the Pacific Northwest has been judicially recognized. See, e.g., *Aluminum Co. of America v. Central Lincoln Peoples’ Utility Dist.*, 467 U.S. 380 (1984); *Forelows on Board v. Johnson*, 743 F.2d 677, 679-680 (9th Cir. 1984), *cert. denied*, ..... U.S. ...., 106 S.Ct. 3293 (1986); *Central Lincoln Peoples’ Utility District v. Johnson*, 735 F.2d 1101, 1106 (9th Cir. 1984); *Public Power Council v. Johnson*, 674 F.2d 791, 792, 795 (9th Cir. 1982).

[agency] shall not be deemed to be officers or employees of the United States for any purpose." (16 U.S.C. §839b(a)(2),(3).)<sup>4</sup>

The Act contemplated that each member of the Council would, within the parameters of the Act, function pursuant to the law of the state that appointed him or her, and that the appointment, tenure, removal and compensation of each Council member would be governed by the laws of his or her own state. As set forth in a Congressional report on the Act:

"The arrangement contemplates the State officials on the Council would be authorized to carry out their functions under State law consistent with the scheme of the bill. Council members are deemed to be employees or officers of their respective States, and are subject to removal pursuant to, and compensated in accordance with, applicable State law." (H.R. Rep. No. 976 (Pt. II), 1980 U.S. Code Cong. and Adm. News 6038.)

Each Northwest State enacted legislation authorizing its entry into the compact;<sup>5</sup> pursuant to the state legislation, members were appointed; and on April 28, 1981, the Council came into existence.

### 3. Mandate To Develop the Plan.

The Act required the Council to prepare and adopt, within two years after it was established and its members appointed, "a regional conservation and electric power plan." (16 U.S.C. § 839b(d)(1).) The plan was to "set

<sup>4</sup>The Act also provided that in the event the agency was not established through an agreement among the states, or its formation was determined to be unlawful, a federal agency would be established in its place. (16 U.S.C. §839b(b).)

<sup>5</sup>Idaho Code § 61-1201 *et seq.* (Supp. 1984); Mont. Code Ann. § 90-4-401 *et seq.* (1983); Or. Rev. Stat., § 469.800 *et seq.* (1983); Wash. Rev. Code, § 43.52A.010 *et seq.* (1983). (Pet. Appendices "I", "J", "K", and "L".)



forth a general scheme for implementing conservation measures and developing resources . . . with due consideration by the Council for (A) environmental quality; (B) compatibility with the existing regional power system; (C) protection, mitigation and enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantities and qualities of flows for successful migration, survival and propagation of anadromous fish; and, (D) other criteria which may set forth in the plan." (16 U.S.C. § 839b(e)(2).)

#### **4. Preparation of the Plan.**

The preparation of the original plan spanned a period of two years, from April 1981 through April 1983. It entailed widespread public participation and the expenditure of substantial time and effort by the Council, its staff, outside consultants, and advisors. Six major studies were prepared. Twenty-four key issues were identified with "issue papers" published on each of them. The Council also formed six advisory committees made up of more than 70 individuals who were experts in electric power issues. The committee members represented utilities, citizens and environmental organizations, the home building industry and other interests. Over two years, 182 public meetings were held throughout the Pacific Northwest. Approximately 400 individuals and organizations presented oral testimony during eight days of public testimony in the four Northwest states. The Council received 18,000 pages of comments on the draft plan from over 1,200 individuals and groups. Ultimately, in April of 1983, a plan ("the Plan") was adopted.<sup>6</sup> (Petitioners' Appendix, "M".)

<sup>6</sup>The Act contemplated that the planning process would be ongoing, specifying that "[t]he adopted plan, or any portion thereof, may be amended from time to time, and shall be reviewed by the Council not less frequently than once every five years." (16 U.S.C. § 839b(d)(1).) In fact, the Plan, including the model conservation standards, has been amended on several occasions since this litigation was filed. 50 Federal

*(footnote continued on next page)*



## 5. Model Conservation Standards.

The Act requires the Council to develop "[m]odel conservation standards . . . designed to produce all power savings that are cost-effective for the region and economically feasible for consumers . . ." (16 U.S.C. § 839b(f)(1).) Thus, a major focus of the Council's task in preparing the Plan was the development of model conservation standards for residential space heating. These standards constitute a critical component in meeting the energy needs of the region during the 20-year period addressed by the Plan.

The model conservation standards for residential space heating that were incorporated into the Plan specified electric energy performance budgets for space heating of residential structures. As determined by the Council, the region contains three climate zones: Zone 1 (west of the Cascade Mountains); Zone 2 (Oregon and Washington east of the Cascade Mountains); and Zone 3 (Idaho and Montana). The standards for each of the region's three climate zones were expressed as the maximum number of kilowatt-hours of electricity to be used for space heating per square foot per year. (Pet. App. "M", pp. 45-77.)

The Plan set forth, as exemplars, the building component specifications used to formulate the model standards. While these specifications may be adopted as prescriptive standards by any governmental or other body, such adoption is not mandatory. To quote the Plan itself:

"Those entities which choose not to adopt and enforce the [model conservation] standards [for residential space heating] should prepare an alternative plan for achieving

---

*(footnote continued from preceding page)*

Register 5021, February 5, 1985; 50 Federal Register 30654, July 26, 1985; 50 Federal Register 40091, October 1, 1985; 51 Federal Register 7364, March 3, 1986, 51 Federal Register 16239, May 1, 1986. The Council also is currently in rulemaking with respect to the Plan. 51 Federal Register 42031 (Nov. 20, 1986).

savings that are comparable to those achievable through the use of the standards. The alternative plan may employ electric service requirements, rate designs, or any other technique for achieving conservation." (Pet. App. "M", pp. 62-63.)

## 6. Proceedings Below.

Under the terms of the Act, 16 U.S.C. § 839f(e)(5), the adoption of the Plan was reviewable through an original review proceeding in the United States Court of Appeals for the Ninth Circuit; and in July of 1983 Petitioners instituted such a review proceeding. Petitioners attacked the adoption of the Plan on the grounds that (a) it failed to comply with certain statutory criteria prescribed by the Act, specifically that conservation standards be "cost effective" for the region and "economically feasible" for consumers; (b) the Council, in adopting the Plan, failed to comply with state environmental laws;<sup>7</sup> and (c) the creation of the Council violated the Appointments Clause of the United States Constitution. (Petitioners' Opening Brief, pp. 15-55.)

After the review proceeding was instituted the United States intervened. The United States' position was that insofar as the authority of the Council implicated in this proceeding was involved, the creation of the Council was consistent with the Appointments Clause; and that while other powers with which the Council was vested raised a

---

<sup>7</sup> Petitioners did *not*, however, contend that the Council violated *federal* environmental laws. Rather, their sole reference to federal environmental laws was as follows:

"The Council is subject to state environmental law . . . If this Court holds that the Council's exercise of authority violates the Appointment Clause . . . and the Council is re-constituted through appointment conforming with the Clause, then the Council would have to prepare an EIS consistent with the requirements of the federal National Environmental Policy Act. See 42 U.S.C. §§ 4332, *et seq.*" (Petitioners' Opening Brief, p. 48, fn. 35.)

potential issue concerning the applicability of the Appointments Clause, those powers were not implicated in this proceeding and, therefore, the Court should not reach the constitutional questions that might be raised by their possible future exercise. (Brief of the United States as Intervenor, pp. 5-12.)

On April 10, 1986, the United States Court of Appeals for the Ninth Circuit, by a divided vote, denied the petition for review. (Pet. App. "A".)

#### **a. The Majority Opinion.**

The reasoning of the majority opinion in respects pertinent here was as follows:

##### **(i) The Council Is An Interstate Compact Agency.**

The Court of Appeals concluded that the Council is a body created pursuant to an interstate compact within the meaning of Article I of the Constitution, rejecting the Petitioners' contention to the contrary.<sup>8</sup>

---

<sup>8</sup>The Court observed that the intention of Congress that the Council not be a federal agency and not be controlled by the federal government "is clear from both the language of the statute . . . and from the legislative history." A "principal purpose of the Council," the Court explained, "is to represent state concerns about regional problems" and "Congress deemed it undesirable for a federal agency to represent state concerns to yet another federal agency." It noted that the indicia of state compacts are "establishment of a joint organization for regulatory purposes; conditional consent by member states in which each state is not free to modify or repeal its participation unilaterally; and state enactments which require reciprocal action for their effectiveness," and that "[t]he Council satisfies all these indicia."

The Court also rejected the Petitioners' argument that Congressional approval for the Council before the states agreed to form it and the Council's potential impact on federal agency were unusual features for a state compact agency and therefore rendered the Council a federal agency.

Finally, the Court observed that "[t]here is no bar against federal agencies following policies set by non-federal agencies" and "[t]he federal government has in fact agreed to be bound by state law in several areas." (Pet. App. "A", pp. 6-14.)

(ii) **The Method of Appointment of Council Members Does Not Violate the Appointments Clause.**

The Court of Appeals rejected Petitioners' contention that "even if the Council is a valid compact organization, the appointments clause of the United States Constitution requires that Council members be appointed not by the state governors . . . but by the President because the Council exercises significant authority over the federal government." The Court explained that the Appointments Clause "is addressed to the separation of . . . powers between the President and Congress" and it has never been held that "the appointments clause prohibits the creation of an interstate planning council with members appointed by the state."<sup>9</sup> (Pet. App. "A", pp. 15-16.)

---

<sup>9</sup>The Court of Appeals acknowledged that in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court stated that "any appointee exercising significant authority pursuant to the laws of the United States is an 'officer of the United States' and must, therefore, be appointed' . . . by the President." It pointed out, however, that Petitioners' "claim that appointment of the Council members by the state governors violates *Buckley* . . . would outlaw virtually all compacts because all or most of them impact federal activities and all or most of them have members appointed by the participating states."

Under *Buckley*, the Court of Appeals explained, the appointments clause "applies to (1) all executive or administrative officers . . . (2) who serve pursuant to federal law . . . and (3) who exercise significant authority over federal government actions"; and "[u]nless all three prongs of the *Buckley* test are met, there is no violation of the appointments clause." The Council members, the Court of Appeals stated, "do not perform their duties pursuant to laws of the United States" but, rather, "Council members perform their duties pursuant to a compact which requires both state legislation and congressional approval." The Court of Appeals pointed out that in the absence of "substantive state legislation, there would be no Council and no Council members to appoint"; that it is state law, "within parameters set by the Act," that governs "the Council members' appointment, salaries and administrative operations" of the Council; and that it is the states that "ultimately empower the Council members to carry out their duties."

The purpose of the appointments clause, as recognized in *Buckley*, the Court of Appeals noted, was "maintaining the separation of powers within the federal government" and "[t]his concern is not implicated

(footnote continued on next page)

**(iii) The Plan Does Not Violate the Act.**

The Court of Appeals explained that a court reviews the legal interpretation of a statute adopted by an administrative agency charged with "setting its machinery in motion" deferentially; that the "preparation and consideration of the plan is a matter within Council authority over which the Act accords the Council considerable flexibility"; and that "therefore, we will defer to the Council's interpretations of § 839b [the portion of the Act governing preparation of the Plan] if reasonable." It concluded that the Council's interpretation of the requirement that conservation measures be "economically feasible for consumers" was reasonable and, on that basis, sustained the interpretation. (Pet. App. "A", pp. 22-44.)

**(iv) The Plan Does Not Violate State or Federal Environmental Laws.**

The Court of Appeals rejected Petitioners' "claim that the 1983 plan violates state environmental laws . . . because the Council did not prepare an environmental impact assessment on the model conservation standards." It noted that an interstate compact agency "is considered the state-created agency of each state"; and "[a] state can impose state law on a compact organization only if the compact specifically reserves the right to do so." Accordingly, the Court of Appeals concluded, since "[n]either Washington nor Montana reserved such rights in their statutes agreeing to the establishment of the Council," state environmental laws were inapplicable. The Court of Appeals also determined that it was not necessary to "decide whether or to

---

*(footnote continued from preceding page)*

here . . . [since] [i]n this case, unlike *Buckley*, Congress has not arrogated to itself a power that would otherwise be exercised by the President"; and "[b]ecause Congress neither appoints nor removes the members of this Council, the balance of powers between Congress and the President is unaffected." (Pet. App. "A", pp. 15-20.)

what extent federal environmental laws . . . would apply . . . [since] [n]either BPA nor the Council has taken a substantial federal action affecting the human environment which might trigger application of federal environmental laws." (Pet. App. "A", pp. 44-46.)

#### **b. The Dissenting Opinion.**

The dissenting opinion concluded that "the method of selecting the members of the Council violate[d] the Appointments Clause." The dissent reasoned that the Council was not an interstate compact agency because it lacked certain "classic indicia of an interstate compact": each of the state statutes authorizing the creation of the Council was not conditioned upon action by the states, "[a]ll four states are free to repeal their statutes unilaterally", and "the Council lacks . . . a state purpose".<sup>10</sup> The dissent also concluded that "[w]hile it is difficult to characterize the Council as an interstate compact agency, it is easy to characterize the Council as a federal agency" since it meets the criteria of an "agency" and "has a federal purpose and received its authority from federal law."<sup>11</sup> Finally, the dissent concluded that even if the Council is an

---

<sup>10</sup> The dissent stated that "the purpose of the Council is to guide the actions of the BPA" and that is not a state purpose — this despite its acknowledgment that "interstate compacts by their very nature have federal law implications and provide a vehicle for states to act in a manner in which a state may not act without Congressional consent, thus altering a state's sphere of authority."

The dissent also alluded to the fact that the Act "authorizes the creation of the Council on the consent of only three of the four statutes," yet the Act does not limit the geographical scope of the Council's responsibilities in such a case." (In fact, while it is true that the Act does not contain an *express* limitation, whether it contains an *implied* limitation would be a matter of statutory interpretation.)

<sup>11</sup> The dissent opined that the Council "receives its authority from federal law" even though it was *state* law that created the Council and even though it is *state* law which governs the appointment, tenure, removal and compensation of Council members.



interstate compact agency, "members of interstate compact agencies are not exempt from the appointments clause"; that "Congress may not usurp the President's power to nominate federal officers" and "Congressional authority would be enhanced at the expense of the executive if Congress had the unrestricted power to confer the appointment authority on third parties"; that "the Compacts Clause is not an exception to the Appointments Clause"; and that the Appointments Clause applies to anybody that derives "significant power and authority" from the federal law. It reasoned that various powers with which the Council is vested conferred upon the Council significant authority under federal law, and thus the creation of the Council entailed a violation of the Appointments Clause that could not be sanctioned on the basis of "cooperative federalism." (Pet. App. "A", pp. 46-79.)

**c. The Petitions for Rehearing and Suggestions for Rehearing En Banc.**

Both the Petitioners and the United States petitioned for rehearing and suggested a rehearing *en banc*. The Petitioners' position was that the judgment of the Court of Appeals was incorrect. (Pet. App. "T".)

The position of the United States, however, was that the *judgment* of the Court of Appeals was correct but that its *reasoning* was erroneous. The United States pointed out that "[t]he *only* authority of the Council directly involved in this case is its authority to . . . recommend model conservation standards"; that "[t]hese standards impose no legal obligation on anyone"; and that "[w]e agree with the panel majority that Congress can constitutionally authorize an interstate compact that creates a regional planning agency meeting the above description, and that such an agency may have the planning and recommending powers exercised by the Council to date." It concluded that "[t]he



question how far Congress may authorize a state or regional agency to direct, rather than advise, a federal program without running afoul of the Appointments Clause is . . . one that is largely unexplored"; but that "[q]uestions that may arise in the future from the Council's exercise of its ongoing planning process are simply not ripe for decision in this case." (Pet. App. "S", pp. 5-9.)

Both petitions were denied.

## II.

### ARGUMENT

#### **1. The Determination of the Court of Appeals That the Appointment of the Members of the Council by the States of the Pacific Northwest Does Not Violate the Appointments Clause Is Plainly Correct and Does Not Present a Substantial Constitutional Question.**

The Petitioners' principal argument is that because the Act permits members of the Council to constrain certain actions of BPA, those members must be appointed in compliance with the Appointments Clause. That argument, however, is without merit. (Pet. App. "A.", pp. 11-20.)

##### **a. The Purpose of the Appointments Clause Is to Maintain a Balance of Power Between the Executive and Legislative Branches of Government and Prevent an Aggrandizement of Power by the Latter Over the Former. Since the Members of the Council Are Not Appointed or Removable by Congress, No Such Aggrandizement of Power Is Threatened or Even Possible.**

The Appointments Clause of the Constitution was motivated by concerns over "the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976). These concerns also are reflected in the Framers' separation of legislative, executive

and judicial powers within the federal government. The purpose of so dividing the federal government was to “‘diffus[e] power the better to secure liberty.’” *Bowsher v. Synar*, .... U.S. ...., 106 S.Ct. 3181, 3186 (1986), quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952). The Appointments Clause responds to these concerns by denying Congress a direct role in the appointment or removal of executive officials except within narrow limits. Leaving such power in legislative hands would, this Court has held, create executive officials who owe their allegiance to Congress, thereby threatening the Constitution’s separation of powers. See *Bowsher v. Synar*, *supra*, 106 S.Ct. at 3182.

No Appointments Clause issue is raised in this case because all powers of appointment and removal are vested in the hands of the governors of the four Northwestern states. See 16 U.S.C. §839b(a)(2)(B), (3). Congress does not appoint or remove Council members. Its sole control over Council members (apart from reporting requirements, see 16 U.S.C. §839b(h)(12)(A)) is the constitutional power to amend the Act.<sup>12</sup> Accordingly, the evil the Founders sought to avoid — the aggrandizement of Congressional power — is not present.<sup>13</sup>

*Bowsher v. Synar*, 106 S.Ct. 3181, *supra*, confirms that the purpose of the Appointments Clause was to maintain a balance of power between the executive and legislative branches of government; for Congress to retain the power to appoint or remove executive officials would upset that

---

<sup>12</sup> This level of control, which exists in any congressional delegation of authority to any executive agency, is wholly consistent with the Constitution. See *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 954-55 (1983); *Bowsher v. Synar*, .... U.S. ...., 106 S.Ct. 3181, 3182 (1986).

<sup>13</sup> Indeed, far from threatening the interests that motivated the Founders to provide for a separation of powers within the federal government, the Act diffuses governmental power outside the federal government.

balance. It was because the Gramm-Rudman Act reserved to Congress the power to remove an official exercising executive powers that the legislation was declared unconstitutional.

The Court of Appeals' opinion in this case employed the same Appointments Clause analysis utilized in *Synar*. As the Court of Appeals explained, Congressional aggrandizement of its own power could not occur because Congress neither appoints nor removes members of the Council. The balance of power between Congress and the President is unaffected.

**b. The Appointments Clause Applies Only To The Appointment of Federal Officers, and Unless Members of the Council Are Federal Officers the Appointments Clause Could Not Be Applicable to Them. Since Members of the Council Hold Office and Exercise Authority Pursuant to State Law, Obviously They Are Not Federal Officers.**

The Appointments Clause applies only to the appointment of "Officers of the United States." Hence, unless the members of the Council are federal officers, the Appointments Clause could not be applicable to them. An examination of the relevant legislation leads to the conclusion that the members of the Council are not federal officers.

A basic purpose of Congress in authorizing the creation of the Council was to permit the representation of *state* concerns about a regional problem — not to create an agency that would reflect *federal* concerns. As the Court of Appeals noted:

"One of the principal purposes of the Council is to represent state concerns about regional problems; Congress deemed it undesirable for a federal agency to

represent state concerns to yet another federal agency." (Pet. App. "A," pp. 7-8.)<sup>14</sup>

Rather than creating an agency itself, Congress consented to the formation of an interstate agency through agreement among the states of the region — an agency that Congress expressly provided in the Act would *not* be a federal agency; an agency that would not and could not come into existence unless the states of the region enacted appropriate enabling legislation; and an agency whose members would, within the parameters of the Act, function pursuant to state law and whose appointment, tenure, removal and compensation would be governed exclusively by the laws of the respective appointing state. To quote a Congressional report on the Act:

"The arrangement contemplates the State officials on the Council would be authorized to carry out their functions under State law consistent with the scheme of the bill. Council members are deemed to be employees or officers of their respective States, and are subject to removal pursuant to, and compensated in accordance with, applicable State law." (H. R. Rep. No. 976 (Pt. II), 1980 U.S. Code Cong. and Adm. News 6038.)

In short, members of the Council hold office and exercise authority pursuant to state law; obviously they are not federal officers.<sup>15</sup>

---

<sup>14</sup> During the course of the floor debates, for example, a Senator representing one of the states of the Pacific Northwest stated:

"The Pacific Northwest does not need and candidly will not suffer lightly a federally imposed regional planning process with apparent input from Washington acting as a federal agency." (126 Con. Rec. 30181.)

<sup>15</sup> If, however, the states had failed to give the required consent to the creation of the Council or its formation was determined to be unlawful, a federal agency would be established in its place. See footnote 4, *supra*. Hence if Petitioners were successful in having the Council declared unconstitutional, the effect would be to expand the federal bureaucracy through the creation of a new federal agency.

**c. The Fact That Federal Law Permits An Appointee to Constrain Federal Power Does Not Transform That Appointee Into A Federal Official For Purposes of the Appointments Clause.**

As indicated *supra*, the principal thrust of the Petitioners' attack upon the Court of Appeals' decision is that whenever federal law permits an appointee to constrain significant federal power, that law necessarily renders the appointee a federal official for purposes of the Appointments Clause; and since the Council has the power to constrain the conduct of a federal agency, BPA, the members of the Council are federal officials.

Petitioners are wrong for several reasons.

To begin with, there is abundant judicial sanction, including decisions of this Court, for federal law authorizing non-federal officials to constrain federal power; and there has never been the remotest suggestion that the authorization would transform the appointee into a federal official for purposes of the Appointments Clause. As noted by Professor Tribe (who was "of counsel" to the Council in the Court of Appeals) in *Constitutional Choices* 72 (1985):

"Neither is there, nor could there be, any general principle that any one to whom a federal statute delegates a significant decision-making role on which the rights or duties of persons outside Congress may depend becomes, by virtue of such delegation, an 'Officer of the United States' within the meaning of the Appointments Clause . . . If such a principle exists, then Congress could not 'confer upon the states' — which are surely not United States 'Officers' — an authority to restrict the flow of interstate commerce which they would not otherwise enjoy. And the private individuals and groups to whom decision-making roles were delegated in *Curran v. Wallace*, [306 U.S. 1 (1939)] and *United States v. Rock*

*Royal Co-Operative*, [307 U.S. 533 (1939)], for example, would have been United States Officers whose failure to be appointed in accord with Article II would have constituted fatal constitutional flaws in the statutory schemes upheld in those two landmark decisions."<sup>16</sup>

Moreover, interstate compacts created under Article I of the Constitution characteristically constrain federal power. They are, by definition, agreements that tend "to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United

---

<sup>16</sup> In *California v. United States*, 438 U.S. 645 (1978), for example, this Court upheld a statutory scheme which required the Secretary of the Interior, in executing his responsibilities as administrator of a federal water power project, to comply with all conditions imposed by a state agency. The potential constraints on the Secretary were at least as great as those that the BPA may be subjected to under the Act. Nonetheless, the Court, characterizing the challenged Act as a "leading example" of "cooperative federalism," held that the only constitutional limitation on the state agency was that it could not impose any constraints on the federal program which were "inconsistent with congressional directives." (*Id.* at 650.) Accord: *Hancock v. Train*, 426 U.S. 167, 178-80 (1976).

See also *Opp Cotton Mills, Inc. v. Administrator, etc.*, 312 U.S. 126, 134-35, 144-47 (1941) (under the Fair Labor Standards Act, minimum wages are set by a federal officer "in collaboration with an industry committee" composed of private individuals; "no wage is fixed which is not recommended by the Committee"); *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 577-78 (1939) (under the Agricultural Marketing Act of 1937, the Secretary of Agriculture's "market orders" regulating prices and marketing practices of agricultural products must be approved by a specified percentage of producers and handlers of products); *Currin v. Wallace*, 306 U.S. 1 (1939) (under the Tobacco Inspection Act of 1935, the Secretary of Agriculture may designate tobacco markets and establish inspection and grading standards for such markets, but the effectiveness of proposed regulations is conditioned upon approval by two-thirds of the growers in the designated area); *St. Louis Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U.S. 281 (1908) (the Interstate Commerce Commission is directed to promulgate standards to be set by the American Railway Association and to be enforced against all common carriers in interstate commerce); *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918) ("the contention that the act is void as a delegation of federal power to state officials because of some of its administrative features is too wanting in merit to require further notice").



States.” (*Virginia v. Tennessee*, 148 U.S. 503, 519 (1893)); or, to put it another way, they are agreements “ ‘which might limit, or infringe upon a full and complete execution by the General Government, of the powers intended to be delegated by the Federal Constitution. . . .’ ” (*United States Steel Corp. v. Multistate Tax Com’n.*, 434 U.S. 452, 466 (1978).) Indeed, the purpose of the Constitution in requiring Congressional consent to the formation of an interstate compact is to retain ultimate federal authority over *state* actions that might constrain *federal* power. As explained in *Cuyler v. Adams*, 449 U.S. 433, 439-40 (1981):

“By vesting in Congress the power to grant or withhold consent, or to condition consent on the States’ compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative *state* action that might otherwise interfere with the full and free exercise of federal authority.” (Emphasis added.)

Congress has, on a number of occasions, consented to the formation of state compact agencies the purpose of which is to limit federal agencies. *See, e.g.*, the Boulder Canyon Project Act of 1928, 45 Stat. 1062, 43 U.S.C. §7g; Upper Colorado River Compact Act, 70 Stat. 110, 43 U.S.C. §620m; Susquehanna River Basin Compact, Pub.L.No. 91-575, §12.1, 84 Stat.1509, 1424 (1970); Delaware River Basin Compact, Pub. L. No. 87-328, §11.1(b), 75 Stat. 688, 701 (1961). If Petitioners’ argument were extrapolated to its logical conclusion, it would mean that all officials of agencies created pursuant to interstate compacts — and possibly all persons charged with implementing interstate compacts whether or not they were members of interstate compact agencies — would have to be appointed in compliance with the Appointments Clause.



Interstate compacts obviously play an important role in addressing regional problems that transcend state boundaries. Since no state could be expected to utilize the compact mechanism if the officials involved would be appointable, removable, and regulatable by the federal government, application of the Appointments Clause could "spell the death knell for interstate compacts." *People v. South Lake Tahoe*, 466 F.Supp. 527, 535-36 (E.D. Cal. 1978.) Is it conceivable that the Framers would have intended the Appointments Clause to produce such an anomalous result?<sup>17</sup>

In summary, Petitioners' assertion that the appointment of the members of the Council by the states of the Pacific Northwest violates the Appointments Clause does not present a substantial constitutional question.<sup>18</sup>

---

<sup>17</sup> Interstate compacts are particularly useful in addressing regional issues related to electric power systems and interstate rivers. As Professors Frankfurter and Landis observed more than half a century ago with regard to the use of compacts to deal with regional problems:

"With all our unifying processes nothing is clearer than that in the United States there are being built up regional interests, regional cultures and regional interdependencies. These produce regional problems calling for regional solutions.

\* \* \*

Perhaps the sharpest emergence of this problem is due to the widespread development of electric power." Frankfurter & Landis, *The Compact Clause of the Constitution — A Study in Interstate Adjustments*, 34 Yale L.J. 685, 708 (1925).

<sup>18</sup> Petitioners also contend that the powers of the Council conflict with the "principle of national supremacy" (Pet., p. 17). As Petitioners themselves concede, however, Congress has the power to consent to state regulation of federal programs and activities (Pet., p. 19 n. 12). Although Petitioners suggest that there might be some limits on congressional power to authorize state regulation of federal activities, Petitioners have cited no authority which suggests, much less holds, that Congress lacks the power to allow state officials to exercise authority similar to that conferred on the Council. Such cooperative arrangements between Congress and the States are familiar examples of Congress' exercise of its plenary power under the "necessary and proper" clause.

(footnote continued on next page)

2. **Even if the Determination of the Court of Appeals that the Appointment of the Members of the Council By the States of the Pacific Northwest Does Not Violate the Appointments Clause Were Not Plainly Correct, the Grant of Certiorari Would Still Be Inappropriate.**

The Court of Appeals' decision that the appointment of the members of the Council by the states of the Pacific Northwest does not violate the Appointments Clause is plainly correct and hence no substantial Appointments Clause question is presented. Even assuming, however, that a substantial constitutional question were presented, the granting of certiorari would still be inappropriate.

- a. **The Decision of the Court of Appeals Does Not Conflict with Any Decision of this Court or of Any Other Circuit.**

A significant criterion for granting or denying petitions for certiorari is, of course, the need to promote uniformity of decisions. Here, the Court of Appeals' decision does not conflict with any other Supreme Court or Court of Appeals' decision. Indeed, it is supported by a long line of decisions of this Court, including, as explained *supra*, the recent decision of the Court in *Bowsher v. Synar*, .... U.S. ...., 106 S.Ct. 3181 (1986).

---

*(footnote continued from preceding page)*

Moreover, Petitioners' assertion that "limitations are particularly appropriate when the regulation of the national right or power at issue is a product of combined congressional-state action" is manifestly untenable. Surely the principle of federal supremacy is less threatened by a scheme of "cooperative federalism" than by a statute granting to the states exclusive authority to regulate matters of joint federal-state concern. Beyond that, any federal supremacy concern is satisfied by the requirement that the Council "carry out its functions and responsibilities in accordance with" the requirements and provisions of the Act.

**b. This Court Grants Certiorari to Alter Judgments, Not Merely to Revise Opinions. Here the Intended Beneficiary of the Appointments Clause, the Executive Branch of the Federal Government, Has Taken the Position that the Judgment of the Court of Appeals is Correct.**

This Court reviews *judgments*, not *opinions*. As noted in *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945): "Our power is to correct wrong judgments, not to revise opinions . . . ." Accord: *Mississippi University for Women v. Hogan*, 458 U.S. 718, 720 (1982) ("we review judgments, not opinions"); *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) ("This Court . . . reviews judgments, not statements of opinion.") Thus if a *judgment* is correct, certiorari should not be granted merely because the *opinion* on which it was predicated was arguably overly broad or arguably contained erroneous statements.<sup>19</sup>

Here, the intended beneficiary of the Appointments Clause is the Executive branch and presumably it, if anyone, would have a strong incentive to challenge the judgment of the Court of Appeals if it believed that the *judgment* was wrong. Yet the Executive has taken the position that the judgment of the Court of Appeals is correct. This Court should not expend its resources in reviewing a case in which, even if the reasoning of the Court of Appeals were found to be erroneous, the probable outcome would merely be an advisory opinion that did not alter the judgment between the parties.

---

<sup>19</sup> Under Article III of the Constitution the jurisdiction of this Court does not extend to rendering advisory opinions. A Supreme Court decision that would not alter a lower court's judgment but only correct the reasoning which impelled it is, in essence, an advisory opinion.

- 3. The Council, In Promulgating The Plan, Did Not Violate State Or Federal Environmental Laws Because**
- (i) Compact Agencies May Only Be Subjected To State Environmental Laws To The Extent That The Compact So Provides, And The Compact Creating The Council Did Not Provide For The Application Of Such Laws; and**
  - (ii) The Federal Environmental Law That Petitioners Contend Is Applicable Applies Only To Federal Agencies And The Act Expressly Provides That The Council Is Not A Federal Agency.**

**a. No Substantial Issue Is Raised Regarding Compliance With State Environmental Laws.**

As the Court of Appeals stated, an interstate compact agency may be made subject to state environmental laws only if the compact specifically so provides. See Pet. App. "A", pp. 44-45, citing *People v. South Lake Tahoe*, 466 F.Supp. 527 (E.D. Cal. 1978).<sup>20</sup> None of the state statutes that created the Council reserves the right to apply state environmental laws to the Council or the Plan. See Idaho Code § 61-1201 *et seq.* (Supp. 1984); Mont. Code Ann. 90-4-401 *et seq.* (1983); Or. Rev. Stat., § 469.800 *et seq.* (1983); Wash. Rev. Code, § 43.52A.010 *et seq.* (1983).<sup>21</sup>

<sup>20</sup> In *South Lake Tahoe*, the Court noted that application of state environmental law would be precluded "unless the compact reserves to [the state] the rights to impose such a requirement on the bi-state agency." (466 F.Supp. at 537.) Although *South Lake Tahoe* involved an instance in which a state environmental law was applied to an interstate compact agency, it is instructive here by way of contrast. The Tahoe Regional Planning Act at issue in *South Lake Tahoe* expressly authorized "political subdivisions," to adopt and enforce higher regulatory standards with respect to projects coming before the Tahoe Regional Planning Agency (TRPA). See, 466 F.Supp. at 537. In contrast, there is no similar authorization in this case. In *South Lake Tahoe*, the California Environmental Quality Act applied expressly to "regional agenc[ies]." See 466 F.Supp. at 537. Here, in contrast, no state statute applies to regional or interstate agencies.

<sup>21</sup> Only two of the Council's four member states require agencies of state government to prepare environmental impact statements. Wash. Rev. Code § 43.21C.030-31; § 43.19.504(1); Mont. Code Ann., 75-1-

(footnote continued on next page)

Hence, the applicability of *state* environmental laws to the Council clearly is not an issue that merits review by this Court.

**b. No Substantial Question Is Raised Regarding the Applicability of Federal Environmental Law.**

In the Court of Appeals, Petitioners raised no issue regarding the applicability of federal environmental law to the Council. (See footnote 7, *supra*.) They should not be eligible to raise the issue now in this Court.

Assuming that they could do so, however, the National Environmental Policy Act (NEPA) applies *only* to "agencies of the Federal Government." (42 U.S.C. § 4332(2)(C)). The Act expressly provides that the Council is not to "be considered an agency or instrumentality of the United States for the purpose of any Federal law." (16 U.S.C. § 839b(a)(2)(A).)

**4. The Determination Of The Court Of Appeals That The Plan Does Not Violate The Requirement Of The Act That Conservation Measures Be "Economically Feasible" For Consumers Is Plainly Correct. In Any Event, Whether The Plan Does Or Does Not Violate That Requirement Is An Issue Of Limited Significance That Does Not Merit Review By Certiorari.**

Petitioners purport to seek certiorari in order to determine whether the Council, in adopting the Plan, violated the requirement of the act that conservation measures be "economically feasible for consumers." (Pet., pp. 26-30.) The determination of the Court of Appeals that the Plan does not violate the requirement that conservation measures be "economically feasible for consumers" is, for

---

*(footnote continued from preceding page)*

201 (1983). As an agency formed by a compact between the states, the Council cannot be considered a state agency for purposes of these statutes.

the reasons stated by the Court of Appeals, plainly correct. (See Pet. App. "A", pp. 21-44.)<sup>22</sup>

Be that as it may, however, whether the Plan does or does not violate this requirement is obviously an issue of limited significance that does not warrant review by certiorari.

### III

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN M. VOLKMAN  
*Acting General Counsel*

AARON M. PECK  
MCKENNA, CONNER &  
CUNEO

*Attorneys for Respondent  
Northwest Power  
Planning Council*

---

<sup>22</sup> The definition of "economically feasible for consumers" is currently being reviewed by the Council. (51 Federal Register 42033, November 20, 1986.)



No. 86-629

Supreme Court, U.S.  
FILED

JAN 5 1987

JOSEPH E. SPANIOLO, JR.  
CLERK

---

---

**IN THE  
Supreme Court of the United States**

---

**October Term, 1986**

---

**SEATTLE MASTER BUILDERS ASSOCIATION, et al.,**  
*Petitioners,*

**v.**

**PACIFIC NORTHWEST ELECTRIC POWER  
AND CONSERVATION PLANNING COUNCIL,**  
*Respondent,*

**UNITED STATES OF AMERICA,**  
*Intervenor-Respondent.*

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

**PETITIONERS' REPLY MEMORANDUM**

---

**JOHN W. HEMPELMANN**  
*Council of Record, and*

**Paul Sikora  
Michael B. King  
DIAMOND & SYLVESTER  
2600 Columbia Center  
701 Fifth Avenue  
Seattle, Washington 98104-7088  
(206) 623-1330  
*Attorneys for Petitioner***





**TABLE OF CONTENTS**

	<i><u>Page</u></i>
1. The Appointments Clause Issue Is Ripe For Review. ....	1
2. The Appointments Clause Issue Is Not Moot. ....	4
3. The Ninth Circuit's Decision on the Appointments Clause is Judgment. ....	5
4. The MCS Do Have A Significant Impact On The Quality Of The Human Environment. ....	6
5. The Council Must Comply with An Environmental Impact Statement Requirement. ....	6
6. The National Environmental Policy Act Issue Was Properly Before the Ninth Circuit. ....	7
7. The Economic Feasibility Standard Issue Is Not Moot. ....	7
8. Regional Issues Arising Under The Act Warrant Supreme Court Review. ....	8
Conclusion . . . . .	9

## TABLE OF AUTHORITIES

<b>Cases</b>	<b><u>Page</u></b>
<i>ALCOA v. Cent. Lincoln Peoples Util. Dis.</i> , 467 U.S. 380 (1984) . . . . .	4,8,9
<i>Ashwander v. TVA</i> , 297 U.S. 288 (1936) . . . . .	5
<i>Duke Power Co. v. Carolina Env. Study Group, Inc.</i> , 438 U.S. 59 (1978) . . . . .	4
<i>Forelaws on Board v. Johnson</i> , 709 F.2d 1310 (9th Cir. 1983) . . . . .	4
<i>INS v. Chadha</i> , 462 U.S. 919 (1983) . . . . .	3-4
<i>Press-Enterprise Co. v. Riverside Cy., California, Superior Ct.</i> , 106 S. Ct. 2735 (1986) . . . . .	5
<i>Public Power Council v. Johnson</i> , 674 F.2d 791 (1982) . . .	4
<i>Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.</i> , 454 U.S. 464 (1982) . . . . .	6
 <b>Statutes</b>	
16 U.S.C. § 839 . . . . .	6
16 U.S.C. § 839b(6) . . . . .	4
16 U.S.C. § 839b(d)(1) . . . . .	5
16 U.S.C. § 839b(d)(2) . . . . .	5
16 U.S.C. § 839b(f)(1) . . . . .	7
16 U.S.C. § 839b(f)(2) . . . . .	1
16 U.S.C. § 839b(j) . . . . .	2
16 U.S.C. § 839d(a)(1) . . . . .	2
16 U.S.C. § 839d(b)(2) . . . . .	2
16 U.S.C. § 839d(b)(5) . . . . .	2
16 U.S.C. § 839f(e)(5) . . . . .	4
H.R. 5705 . . . . .	3

## TABLE OF AUTHORITIES, cont.

Other Authorities	<u>Page</u>
126 Cong.Rec. H9863 (daily ed. Sept. 29, 1980) . . . . .	2
126 Cong.Rec. H9849 (daily ed. Sept. 29, 1980) . . . . .	3



IN THE  
**Supreme Court of the United States**

---

**October Term, 1986**

---

SEATTLE MASTER BUILDERS ASSOCIATION, et al.,  
*Petitioners,*

v.

PACIFIC NORTHWEST ELECTRIC POWER  
AND CONSERVATION PLANNING COUNCIL,  
*Respondent,*

UNITED STATES OF AMERICA,  
*Intervenor-Respondent.*

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

**PETITIONERS' REPLY MEMORANDUM**

---

The Petitioners reply to arguments first raised in the briefs in opposition filed by Respondent Pacific Northwest Electric Power and Conservation Planning Council ("Council") and Intervenor-Respondent United States.

**1. The Appointments Clause Issue Is Ripe For Review.**

The United States claims that the Appointments Clause issue is not ripe for review. The United States' argument hinges on one point: that "the only 'enforcement' mechanism related to the MCS is contained in 16 U.S.C. 839b(f)(2)." (U.S. 15). The United States is correct that the Council only has the power to recommend a surcharge.<sup>1</sup> However, the surcharge is not the Act's only MCS enforcement mechanism.

---

<sup>1</sup> The United States ignores, however, that such a recommendation is a *precondition* to BPA's right to impose one. See 16 U.S.C. § 839b(f)(2) ("the [BPA] Administrator may *thereafter* impose such a surcharge . . ." (emphasis added)).

The Act *requires* BPA to implement the Council's conservation requirements — here, the MCS. See 16 U.S.C. §§ 839d(b)(2), 839d(a)(1), 839d(b)(5).<sup>2</sup> BPA must administer the Act consistent with that end by taking such actions as setting up financial incentive programs. The Act gives the Council a specific enforcement mechanism to use *against* BPA if BPA refuses: the Council can compel BPA to make a final decision on refusal to comply, and then sue BPA in the Ninth Circuit for its refusal. See 16 U.S.C. § 839b(j). It is *these* powers that are the source of the Petitioners' injury. See § 2, *infra*.

The United States is trying to convince this Court that the Act is an "all or nothing" proposition: either the Council has complete authority over the BPA, or it has none. This ignores Congress' intent to grant the Council a mix of mandatory and advisory powers. As Representative Thomas Foley of Washington, one of the Act's leading supporters, stated:

The heart of the regional planning provisions, the council's role relative to BPA has become much more clearly defined as the bill progressed. Instead of a mere planning body, or a mere advisory body, *it now has a mix of mandatory and discretionary oversight functions and control*. It has also become a nascent independent body, potentially an enormous force in the future of the region. As a result, despite the fears of those familiar with the bill only as originally introduced, the BPA administrator will not be a "czar" under this bill.

126 Cong.Rec. H9863 (daily ed. Sept. 29, 1980) (emphasis added).<sup>3</sup>

<sup>2</sup> The Council's Brief filed does not address the question of the scope of its authority over BPA. Such coyness before this Court should not obscure the Council's clash before the Ninth Circuit with the United States' claim (reiterated here) that BPA is not bound in any way to implement the MCS. The Council argued to the Ninth Circuit that the MCS did bind BPA, and therefore "the court *must* decide whether the Council members are federal officers" subject to the Appointments Clause (Council's Reply to U.S. before Ninth Circuit at 5).

<sup>3</sup> The United States makes much of Representative Dingell's opposition to an unsuccessful amendment that would have made  
(footnote continued on next page)



The United States suggests that, in any case, this Court should wait for another case that will raise the Appointments Clause issue. (U.S. 17-18). This is in neither the regional nor the national interest. The Pacific Northwest needs to know *now* whether the MCS are mandatory, and if they are, whether the Council may exercise such authority. It is impossible for key regional actors to plan for the future when they can not tell who is in charge of what. *Accord* (Brief of Amicus Curiae Idaho Cooperative Utilities Association 13 n.6).

As for the national interest, the Council's powers are proving an enticing model in other public policy areas. (Brief of Amicus Curiae National Association of Homeholders (NAHB) 3-5). The recent passage of the Columbia River Gorge Act, H.R. 5705 (1986), granting powers similar to the Council's to another state appointed body, confirms the tempting nature of such arrangements.<sup>4</sup> Unless this Court acts now, the corrective task will soon assume Augean proportions. *Cf. INS*

---

the Council's surcharge recommendation mandatory. (U.S. 16). However, it ignores that Representative Dingell, in other stages during the debate over the Act, made clear his agreement that the Council would serve as a substantive check on BPA authority:

This bill does not establish the [BPA] Administrator as an "energy czar" but rather, by providing for a public planning council, it permits coordinated electric power planning with wide input by the public. *The council has more than planning authority; it acts as a check on the administrator.*

126 Cong.Rec. H9849 (daily ed. Sept. 29, 1980) (emphasis added).

- <sup>4</sup> President Reagan, in signing the Columbia River Gorge Act, made clear his serious concerns about the constitutionality of lodging such authority in the hands of state appointees:

I have grave doubts as to the constitutionality of the provision in section 10, which would authorize the Governors of Washington and Oregon and the State-appointed Columbia River Gorge Commission to disapprove Federal condemnation actions. The Federal Government may not constitutionally be bound by such State action taken pursuant to Federal law.

Statement by President Ronald Reagan (November 11, 1986).

*v. Chadha*, 462 U.S. 919, 944-45 (opinion for the court), 1003-1015 (Appendix to dissenting opinion of White, J.) (1983).<sup>5</sup>

## 2. The Appointments Clause Issue Is Not Moot.

The United States claims that the on-going process of Plan revision has rendered the Appointments Clause issue moot. (U.S. 19-20). The United States is wrong.

First, the United States misapprehends the injury that gives rise to the Petitioners' Appointments Clause claim. The Council's power to compel BPA to take steps to adopt the MCS has caused jurisdictions throughout the Pacific Northwest to adopt the MCS, and others to move towards adoption. Both adoption of the MCS (at *whatever* level presently under discussion) and the risk of adoption cause the Petitioners substantial injury. See *Duke Power Co.*, 438 U.S. at 72, 74. That the Plan is in the process of potential revision does not change the material fact that the mandatory nature of the Council's power over BPA has caused, and will continue to cause, such injury.

Second, the United States misapprehends the mootness doctrine. If the United States' point is accepted, the Council's appointment would be, for all practical purposes, exempted from judicial review. All the United States has shown is that

<sup>5</sup> Moreover, the federal courts may *not* wait to decide the Appointments Clause issue. Congress mandated prompt resolution of questions arising under the Act, such as the Council's authority, by vesting original jurisdiction in the Ninth Circuit and bypassing the district court stage. 16 U.S.C. § 839f(e) (5); see *Forelaws on Board v. Johnson*, 709 F.2d 1310, 1312 (9th Cir. 1983); *Public Power Council v. Johnson*, 674 F.2d 791, 795 (1982), *rev'd on the other grounds, sub. nom. ALCOA v. Cent. Lincoln Peoples Util. Dis.*, 467 U.S. 380 (1984). Congress then provided for rapid reconstitution of the Council, by Secretary of Energy appointment, in the event state governor appointment was struck down. 16 U.S.C. § 839b(6). Such a mandate for prompt review and resolution of basic structural issues *forecloses* the right of a court to defer adjudication of such issues to another day, on ripeness grounds. See *Duke Power Co. v. Carolina Env. Study Group, Inc.*, 438 U.S. 59, 81-82 (1978).

the Plan is in the process of reevaluation. See 16 U.S.C. § 839b(d)(1); (Council 5 n.6). If the fact of reevaluation was generally enough to bar review, then this case represents one of the classic *exceptions* to the mootness doctrine; a matter "capable of repetition, yet evading review." *E.g., Press-Enterprise Co. v. Riverside Cy., California, Superior Ct.*, 106 S. Ct. 2735, 2739 (1986).<sup>6</sup>

### 3. The Ninth Circuit's Decision on the Appointments Clause is Judgment.

The Council appears to claim the Ninth Circuit's Appointments Clause decision is merely an opinion; an extended exercise in *obiter dicta*. (Council 22). The Council is wrong; and if not, its argument provides an independent basis for review.

The Ninth Circuit's decision is not *dicta*. As previously indicated, the MCS do bind BPA, thereby injuring the Petitioners. See § 1, *supra*. Once the Ninth Circuit declined to grant the Petitioners relief on statutory grounds (i.e., violation of the Act's economic feasibility requirement; failure to comply with environmental laws), it *had* to decide the Appointments Clause issue. *Cf. Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936).<sup>7</sup>

---

<sup>6</sup> Moreover, if the United States is *right*, its point is a basis for review and reversal. The process of reevaluation was underway *before* the Ninth Circuit's decision: the Council formally amended the MCS before the Ninth Circuit's decision. (Council 5 n. 6). In addition, three separate actions were filed in the Ninth Circuit challenging those amendments. Those actions raise, *inter alia*, many of the issues raised by the Petitioners. If such a cycle of reevaluation and challenge rendered the Petitioners' challenge moot, then the petition should still be granted, and the Ninth Circuit's decision *summarily reversed*, for a violation of the jurisdictional bar against advisory opinions in the absence of a case or controversy.

<sup>7</sup> This is a point with which the Council *fully* concurred before the Ninth Circuit. Council's Reply Br. to U.S. before Ninth Circuit at 5. See also, note 2, *supra*.

However, if the Ninth Circuit's decision is *dicta*, it is so for a reason that requires review and reversal. The decision is *dicta* only if the MCS are not binding on BPA. If that were true, the Petitioners would lack standing to make the Appointments Clause claim, and the Ninth Circuit would lack the power to make a decision on that issue. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). The resulting exercise in forbidden advisory opinion making would demand summary reversal.

#### **4. The MCS Do Have A Significant Impact On The Quality Of The Human Environment.**

The United States claims that the MCS do not have a significant impact on the quality of the human environment, "because they are only proposals, upon which [BPA] . . . may or may not base a rate surcharge." (U.S. 20 n.9). As previously demonstrated, § 1, *supra*, the Act requires BPA to take affirmative steps to implement the MCS: *Ergo*, the MCS *do* have a significant impact on the quality of the human environment.

#### **5. The Council Must Comply with An Environmental Impact Statement Requirement.**

The United States and the Council claim that because the Act states that the Council may not be considered an agency of the United States for the purpose of Federal law, and NEPA applies only to agencies of the Federal government, the Council therefore is exempt from federal environmental impact statement ("EIS") requirements. (U.S. 21 n.9); (Council 24). However, both ignore the logical implication of their argument. The Act requires that it be "construed in a manner consistent with applicable environmental laws." 16 U.S.C. § 839. If federal environmental laws do not apply to the Council and the MCS, then *state laws must apply*. The only alternative is *no* EIS compliance requirement; such a result would render 16 U.S.C. § 839 meaningless, and nullify Congress' intent to subject the Council's actions to environmental law requirements.

## 6. The National Environmental Policy Act Issue Was Properly Before the Ninth Circuit.

Contrary to the contention of the Council (Council 7 n.7, 24), the Petitioners raised the issue of the applicability of the National Environmental Policy Act (NEPA) before the Court of Appeals, *see* Petitioners' Reply Brief before the Ninth Circuit at 18, *without objection from the Council*.

## 7. The Economic Feasibility Standard Issue Is Not Moot.

The United States' claim that the economic feasibility standard issue is moot misses the point. The issue is not, as the U.S. implies (U.S. 18-21), whether BPA or the Council are evaluating or have evaluated the economic feasibility of the MCS, but whether, in doing so, they are using the definition of economic feasibility that complies with congressional intent.

Nothing in the United States' Brief indicates that they are. While the United States claims that "under the new MCS specifications advanced by BPA each measure satisfies the *cost-effectiveness* criterion," (U.S. 20) (emphasis added), the Petitioners' challenge is to the Council's application of the *economic feasibility* standard. "Cost effectiveness *for the region*" and "economic feasibility *for consumers*" are separate standards, 16 U.S.C. § 839b(f)(1) (emphasis added), requiring separate methods of analysis.

The United States asserts that, "under the new MCS packages developed by BPA, present value costs of new homes are . . . the same or less than the cost of comparable homes built to existing standards." (U.S. 20). This assertion is based on the same analytical method used by the Council to justify the original MCS. The Petitioners' quarrel is with that method: the meaning of economic feasibility intended by Congress requires a different method of analysis. (Pet. 24-30). Only if the congressionally intended method is employed will housing consumers be spared hundreds of millions of dollars in cost Congress never intended them to bear. (Pet. 29-30).



Hence, even if the proposals before the Council are adopted, the issue will remain.<sup>8</sup>

#### 8. Regional Issues Arising Under The Act Warrant Supreme Court Review.

The United States claims the regional interest in resolving issues peculiar to the Act do not warrant this Court's review. (U.S. 19).<sup>9</sup> This represents an about-face from the United States' position in *ALCOA v. Central Lincoln People's Utility District*, 467 U.S. 380 (1984). Like this case, *ALCOA* involved interpretation of the Act — specifically, the meaning of electric power "preference" provisions. The United States' brief in support of the petition for *certiorari* stated:

[We] recognize that this case may not satisfy the traditional criteria for *certiorari*. The decision below will affect only the Pacific Northwest; in addition, there is no conflict among the circuit courts. We note, on the other hand, that, because original jurisdiction is vested exclusively in the court of appeals for the region . . . there is no prospect of a direct conflict of decisions. Accordingly, it is unlikely that the court below will be persuaded to correct its misreading of the statute, especially given the absence of any clear guidance from this Court, which has had no occasion to consider preference clauses in a like

---

<sup>8</sup> The methodology used by the Council and BPA is the one Ninth Circuit affirmed. (Pet. App. A-36). Even if, as the Council hints might happen (Council 25 n. 22), the Council and BPA were to later adopt an MCS that fortuitously complies with congressional intent, they would not be bound to continue to do so, in light of Ninth Circuit precedent.

Moreover, as the NAHB demonstrates, the Council has once before promised to follow a definition of economic feasibility that accorded with congressional intent, then later acted contrary to it. (NAHB 7-8). Unless this Court grants *certiorari* and reverses, the Council may do so again.

<sup>9</sup> The Council appears to agree. (Council 25). This argument does discredit to the Council's responsibility for the economic well-being of the Pacific Northwest; a responsibility eloquently articulated by the Council itself. (Council 2-4).

context. Moreover, the practical fact is that the decision below could have a severe impact on the national economy: approximately one-third of the nation's total aluminum supply is produced by BPA's DSI customers, many of whom may terminate operations if the court of appeals' decision is not reversed. In addition, BPA provides more than 50% of the power in the Pacific Northwest. . . .

[T]hese considerations justify granting the petition.

Brief for the Federal Respondent at 8 - 9 in *ALCOA* (citations deleted).

Such considerations also justify granting this petition. Here again, it is unlikely that the court below will be persuaded to correct its misreading of the statute, especially since this Court has had no other occasion to consider the meaning of an "economic feasibility" requirement for energy conservation programs in a like context. Here again, the practical fact is that the decision below will have a severe economic impact at least on the region, and potentially the country. (Pet. 29-30; NAHB 5-6). The Petitioners respectfully suggest the United States' position in *ALCOA*, regarding the importance of interpretation of the Act, reflects sounder reasoning than the one advanced now, and urge this Court to follow the *ALCOA* precedent.

### CONCLUSION

For these reasons, and the reasons stated in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

RESPECTFULLY SUBMITTED this 2nd day of January, 1987.

JOHN W. HEMPELMANN  
Council of Record, and

Paul Sikora  
Michael B. King  
DIAMOND & SYLVESTER  
*Attorneys for Petitioner*



DEC 13 1986

JOSEPH F. SPANIOL, JR.  
CLERK

(5)  
No. 86-629

In The  
**Supreme Court of the United States**

October Term, 1986

— o —  
SEATTLE MASTER BUILDERS  
ASSOCIATION, *et al.*,

*Petitioners,*

v.

PACIFIC NORTHWEST ELECTRIC POWER AND  
CONSERVATION PLANNING COUNCIL,

*Respondent,*

UNITED STATES OF AMERICA,

*Intervenor-Respondent.*

— o —  
On Writ of Certiorari to the United States Court  
of Appeals for the Ninth Circuit

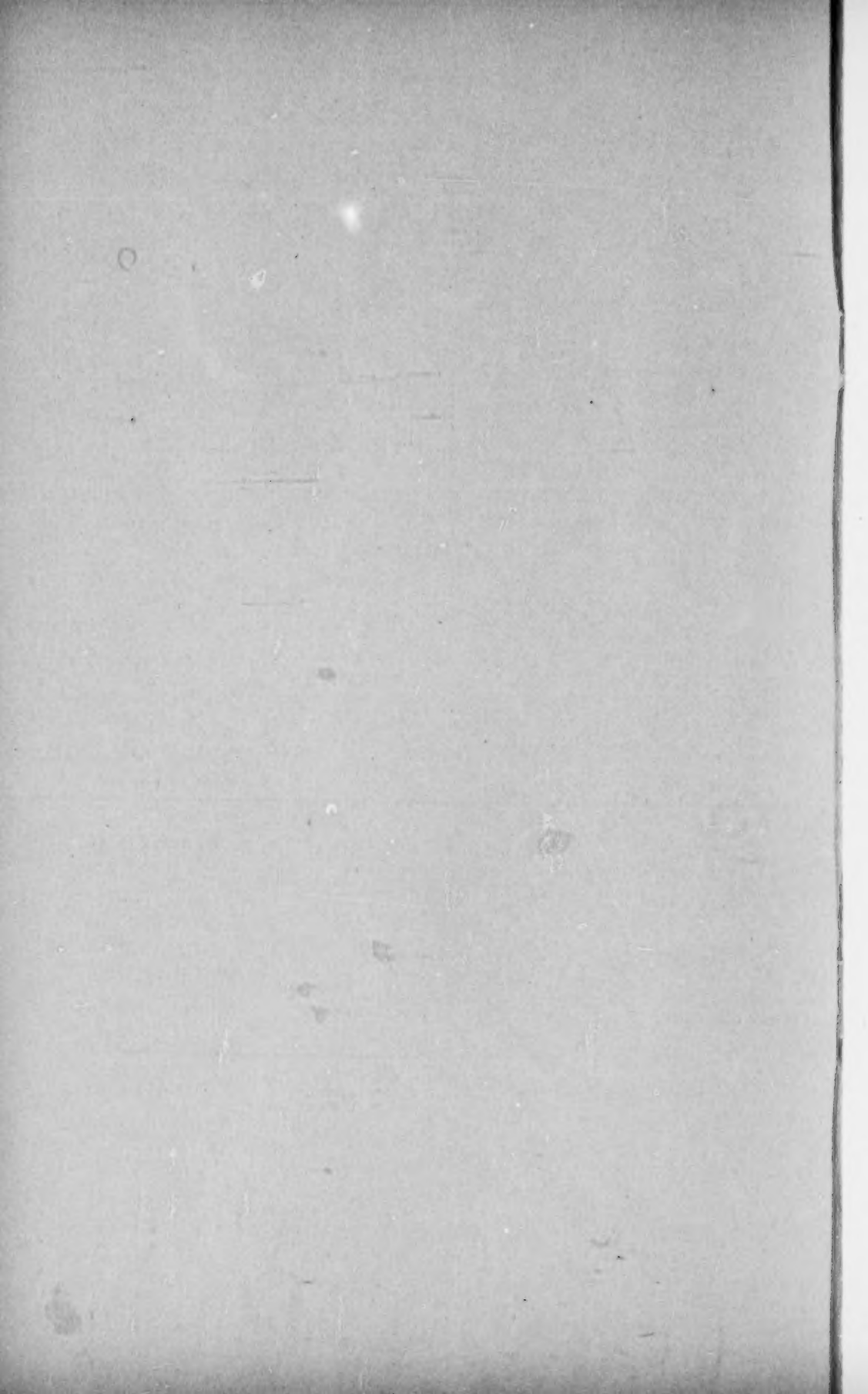
— o —  
BRIEF OF AMICUS CURIAE IN SUPPORT OF THE  
PETITION FOR WRIT OF CERTIORARI

— o —  
THE IDAHO COOPERATIVE UTILITIES  
ASSOCIATION, INC.

— o —  
ROY L. FIGUREN  
Counsel of Record, and

STEVEN R. ORMISTON  
LINDSAY, HART, NEIL & WEIGLER  
Jefferson Place, Suite 400  
350 N. Ninth Street  
Boise, Idaho 83702  
(208) 336-8844

*Attorneys for Amicus Curiae*



## TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE .....	1
STATEMENT OF THE CASE .....	4
SUMMARY OF REASONS FOR GRANTING THE WRIT .....	4
REASONS FOR GRANTING THE WRIT .....	7
I. The Ninth Circuit Erred in Upholding the Constitutionality of the Council by Erroneously Concluding That the Council Was Established Pursuant to an Interstate Compact and Does Not Exercise Authority Pursuant to Federal Law .....	7
II. The Question of the Council's Constitutionality is Ripe for Review and Presents a Justiciable Case or Controversy .....	10
III. The Council Was Not Established Nor Does it Operate Pursuant to an Interstate Compact .....	13
CONCLUSION .....	18
APPENDICES:	
Appendix A Computation of Salmor. River Electric Cooperative Retail Rate Increase .....	A-1
(The following Appendix is bound in a separate volume.)	
Appendix B 1986 Northwest Conservation and Electric Power Plan, Vols. I and II .....	B-1

TABLE OF AUTHORITIES

Page

CASES

<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967).....	12
<i>Babbitt v. United Farm Workers Nat. Union</i> , 442 U.S. 289 (1979) .....	12
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976) .....	5, 7, 8, 10
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984) .....	9
<i>Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System</i> , — U.S. —, 105 S. Ct. 2545 (1985) .....	14
<i>Seattle Master Builders Association, et al. v. Pacific Northwest Electric Power and Conservation Planning Council</i> , 786 F.2d 1359 (9th Cir. 1986) .....	1, 7
<i>Virginia v. Tennessee</i> , 148 U.S. 503 (1893) .....	14
<i>Virginia v. West Virginia</i> , 246 U.S. 565 (1918) .....	14

CONSTITUTION, STATUTES, AND REGULATIONS

United States Constitution, art. II, § 2, cl. 2 .....	10
16 U.S.C. §§ 839-839h .....	4
16 U.S.C. § 839 .....	17
16 U.S.C. § 839b .....	5, 8, 17
16 U.S.C. § 839b(a)(1) .....	8
16 U.S.C. § 839b(a)(2) .....	8
16 U.S.C. § 839b(a)(2)(A) .....	10
16 U.S.C. § 839b(a)(3) .....	8
16 U.S.C. § 839b(a)(4) .....	8
16 U.S.C. § 839b(b) .....	10

## TABLE OF AUTHORITIES—Continued

	Page
16 U.S.C. § 839b(c) (2) .....	8
16 U.S.C. § 839b(c) (3) .....	8
16 U.S.C. § 839b(c) (10) .....	8
16 U.S.C. § 839b(d) (2) .....	11
16 U.S.C. § 839b(e) (1) .....	9
16 U.S.C. § 839b(e) (3) .....	9
16 U.S.C. § 839b(f) (1) .....	9
16 U.S.C. § 839b(f) (2) .....	9
16 U.S.C. § 839d(a) (1) .....	11
Idaho Code §§ 42-3401-3404 .....	14
Idaho Code § 42-3401 .....	14
Idaho Code § 42-3402 .....	14
Idaho Code § 42-3404 .....	14
Idaho Code § 61-1201-1207 .....	9, 15
Idaho Code § 61-1201 .....	14, 15, 17
Idaho Code § 61-1202 .....	16
Idaho Code § 61-1203 .....	16
Or. Rev. Stat. §§ 469.800-845 .....	9, 15
Or. Rev. Stat. § 469.800 .....	15
Or. Rev. Stat. § 469.805 .....	16
Or. Rev. Stat. § 469.815 .....	16
Or. Rev. Stat. § 469.820 .....	16
Mont. Rev. Code Ann. §§ 90-4-401-404 .....	9, 15
Mont. Rev. Code Ann. § 90-4-402 .....	16
Wash. Rev. Code §§ 43.52A.010-050 .....	9, 15

## TABLE OF AUTHORITIES—Continued

	Page
Wash. Rev. Code §§ 43.52A.030-040 .....	16
1986 Northwest Conservation and Electric Power Plan, Vol. I .....	11
1986 Northwest Conservation and Electric Power Plan, Vol. II .....	3

## LEGISLATIVE MATERIALS

H.R. Rep. No. 976 (Pt. I), 96th Cong., 2d Sess. (1980) .....	17
H.R. Rep. No. 976 (Pt. II), 96th Cong., 2d Sess. (1980) .....	17
S. Rep. No. 272, 96th Cong., 1st Sess. (1979) .....	17

## OTHER AUTHORITIES

F. ZIMMERMAN & M. WENDELL, THE INTERSTATE COMPACT SINCE 1925 § 42 (1951) .....	14
-----------------------------------------------------------------------------------	----

**In The**  
**Supreme Court of the United States**  
**October Term, 1986**

---

SEATTLE MASTER BUILDERS  
ASSOCIATION, *et al.*,  
*Petitioners,*  
v.

PACIFIC NORTHWEST ELECTRIC POWER AND  
CONSERVATION PLANNING COUNCIL,  
*Respondent,*  
UNITED STATES OF AMERICA,  
*Intervenor-Respondent.*

---

On Writ of Certiorari to the United States Court  
of Appeals for the Ninth Circuit

---

**BRIEF OF AMICUS CURIAE IN SUPPORT OF THE  
PETITION FOR WRIT OF CERTIORARI**

---

**INTEREST OF AMICUS CURIAE**

Pursuant to United States Supreme Court Rule 36.1, the Idaho Cooperative Utilities Association, Inc. (ICUA) files this brief in support of the Petition for Writ of Certiorari filed by the Seattle Master Builders Association, *et al.* in *Seattle Master Builders Association, et al. v. Pacific Northwest Electric Power and Conservation Planning Council*, No. 86-629 (1986).



The ICUA is an association of cooperative utilities serving approximately 150,000 consumers throughout rural Idaho.<sup>1</sup> The ICUA represents its cooperative utility members in rate and power supply matters before various federal and state agencies, including the Bonneville Power Administration (BPA). The BPA, an agency within the United States Department of Energy, supplies all of the electric power requirements of the cooperatives, which serve as retailers of that power to their consumers/members. As customers of BPA, the cooperatives and their members are directly affected by the 1986 Northwest Conservation and Electric Power Plan (the Plan) as promulgated by the Pacific Northwest Electric Power and Conservation Planning Council (the Council) and as implemented by BPA.

The Plan contains Model Conservation Standards (MCS) which must be adopted by the utility customers of BPA. The adoption of MCS under the Plan is achieved when the specified percentage of newly constructed electrically heated residential and commercial buildings conform to the standards. The Plan recommends that the

---

<sup>1</sup>The ICUA member utilities are Clearwater Power Company, Lewiston, Idaho; Fall River Rural Electric Cooperative, Inc., Ashton, Idaho; Idaho County Light & Power Cooperative, Inc., Grangeville, Idaho; Inland Power & Light Company, Spokane, Washington; Kootenai Electric Cooperative, Inc., Hayden Lake, Idaho; Lost River Electric Cooperative, Inc., Mackay, Idaho; Lower Valley Power & Light, Inc., Afton, Wyoming; Northern Lights, Inc., Sandpoint, Idaho; Prairie Power Cooperative, Inc., Fairfield, Idaho; Raft River Rural Electric Cooperative, Inc., Malta, Idaho; Rural Electric Company, Rupert, Idaho; Salmon River Electric Cooperative, Inc., Challis, Idaho; South Side Electric Lines, Inc., Declo, Idaho; and Unity Light & Power Company, Burley, Idaho.

Administrator of BPA impose a ten percent (10%) annual surcharge on the wholesale power rates of utility customers of BPA who fail to adopt MCS.

By the Council's own estimate, on the average, MCS will add \$2,534 to the construction cost of a single-family home in the Pacific Northwest. 1986 Plan, Vol. II, p. 4-12, Table 5-23 at p. 5-22. In rural Idaho, where local economies are already depressed by the sagging timber and agricultural industries, a \$2,534 increase in the initial cost of a new home is a substantial burden even if this initial cost is subsequently recovered. The initial cost may be prohibitive where it will not be fully recovered through power savings.<sup>2</sup> If the cooperative utilities do not adopt MCS and are subjected to the wholesale rate surcharge, the cooperatives must in turn increase their rates to consumers. For example, Salmon River Electric Cooperative would be required to impose an 8.2% system-wide rate increase upon retail consumers to pay for the 10% surcharge imposed by BPA.<sup>3</sup> The communities served by ICUA members will suffer perhaps the greatest financial burden of any group affected by the Plan through the increased cost of new residential and commercial construction if MCS is adopted, or through the surcharge penalty if MCS is not adopted.

---

<sup>2</sup>The ICUA concurs in the Petitioners' argument that the actual savings from MCS realized by consumers is their average cost of power, rather than the higher marginal cost of power used by the Council. See Petition, pp. 24-30; 1986 Plan, Vol. II, pp. 4-12. Consequently, consumers will not fully recover the initial cost of MCS through subsequent power savings.

<sup>3</sup>The analysis used to compute the necessary retail rate increase is set forth in Appendix A.

The rural electric cooperative, as a rural utility with relatively few consumers and significant distribution costs, is directly impacted by MCS and represents a unique point of view which is not before the Court. The question of the proper establishment, institutional role and legal authority of the Council is a threshold question which must be answered if the cooperatives are to know whether or not they must comply with MCS. Consequently, ICUA respectfully appears as *amicus curiae* in support of the Petition for Writ of Certiorari.

---

O

### STATEMENT OF THE CASE

The ICUA adopts and incorporates by reference the Statement of the Case set forth in the Petition for Writ of Certiorari.

---

O

### SUMMARY OF REASONS FOR GRANTING THE WRIT

Pursuant to the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (the Regional Power Act), 16 U.S.C. §§ 839-839h, the Council, composed of state political appointees, is exercising directory authority over BPA for the acquisition of necessary energy resources in the Pacific Northwest in violation of the appointments clause and supremacy principles of the United States Constitution. The Ninth Circuit Court of Appeals has now given constitutional sanction to the Council's directory authority over BPA.

This case presents unique issues involving purported state control over the federal agency charged by federal

law with the management and control of the Federal Columbia River Power System—the country's largest hydroelectric power operation.

As a statute affecting only the Pacific Northwest, the Regional Power Act is subject to review only in the Ninth Circuit. The Ninth Circuit's decision conflicts with this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). The constitutionality of the Council's authority over BPA is an important question for the ICUA and the parties to this action and must be settled by this Court.

Section 4 of the Regional Power Act, 16 U.S.C. § 839b, specifies in extraordinary detail the requirements for the establishment and operation of the Council. Participation of the states was limited to the formality of providing for the appointment of members to the Council. Although the Council members may "serve" pursuant to the state appointment statutes, it is clear from the Regional Power Act that the Council exercises its authority "pursuant" to that Act. It is well-established that any appointee exercising significant authority pursuant to federal law must be appointed by the President as prescribed by Art. II, § 2, cl. 2, of the United States Constitution. *Buckley v. Valeo*, 424 U.S. 1 (1976). The members of the Council, as currently established, were not appointed in the constitutionally-prescribed manner and, therefore, the Council's actions establishing MCS as part of the Plan are contrary to the Constitution and void.

The question of the Council's constitutionality is ripe for review and presents a justiciable case or controversy. The Council's promulgation of MCS as part of the Plan is an exercise of significant authority over BPA which

impacts both ICUA and the Petitioners. The Regional Power Act requires the Administrator of BPA to implement all conservation measures which are consistent with the Plan. Under the Plan, both residential and commercial MCS are nondiscretionary conservation measures. If the Administrator is to act consistently with the Plan, he must implement residential and commercial MCS. As a result, through MCS and the Plan, the Council is exercising significant authority over BPA impacting both ICUA and the Petitioners.

Finally, the Council does not possess the characteristics of an agency established by an interstate compact. No formal and contractual agreement exists between the Pacific Northwest states. The state's appointment statutes simply provide that each state is participating in a council created pursuant to the Regional Power Act. The Regional Power Act itself does not contain sufficient indicia of congressional intent to create and consent to an interstate compact. Although Congress couched the establishment of the Council in terms of an "agreement" between the states, conspicuously absent is reference to an interstate compact. Moreover, the Idaho appointment legislation specifically reserves to that state the various areas of state law which would logically be subject to the jurisdiction of the Council were it a compact agency (retaining the rights of the state and its citizens with respect to water or water related rights and rights relating to the regulation of the energy industry). Despite its attempt to avoid the constitutional difficulties establishment of the Council created, Congress and the states did not create an interstate compact, nor did they intend to create an interstate compact.

---

## REASONS FOR GRANTING THE WRIT

### I. The Ninth Circuit Erred in Upholding the Constitutionality of the Council by Erroneously Concluding That the Council Was Established Pursuant to an Interstate Compact and Does Not Exercise Authority Pursuant to Federal Law

In *Buckley v. Valeo*, this Court held that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States’ and must, therefore, be appointed in the manner prescribed by § 2, cl.2 of [Article II of the United States Constitution].” 424 U.S. 1, 126 (1976). The Ninth Circuit interpreted this holding to require the presence of three elements as a prerequisite to application of the appointments clause. Those elements are: (1) all executive or administrative officers, (2) who serve pursuant to federal law, and (3) who exercise significant authority over federal government actions. *Seattle Master Builders Association, et al. v. Pacific Northwest Electric Power and Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986). The Ninth Circuit concluded that because the Council was established pursuant to an interstate compact, the Council members do not “serve” pursuant to federal law and, therefore, the second element of *Buckley* was absent and the Council was not established in violation of the appointments clause. *Id.*

The underlying policy for this holding was the Ninth Circuit’s conclusion that the appointments clause concerns only the separation of powers within the federal government, a concern not implicated in this case. The policy



of this conclusion is addressed in the Petition for Writ of Certiorari at pages 11-20. We concur in the Petitioners' analysis and that analysis will not be repeated here.

The Ninth Circuit's technical application of the holding in *Buckley* is also erroneous. First, *Buckley* does *not* require that the Council members "serve" pursuant to federal law. Rather, *Buckley* requires only that the Council members exercise significant authority "pursuant" to federal law. The distinction is more than mere semantics.

First, the Council was not established by an interstate compact. See Part III, *infra* at p. 13. In any event, the characterization of the Council as an interstate compact agency or a federal agency is a matter of form, not substance, and is not dispositive. The Court must look to the Council's statutory authority over BPA.

Section 4 of the Regional Power Act, 16 U.S.C. § 839b, specifies in extraordinary detail the requirements for the establishment and operation of the Council. Congress provided that the "purposes of this section are to provide for the prompt establishment and effective operation of the [Council]." 16 U.S.C. § 839b(a)(1). The Regional Power Act specifies rules for the appointment of members, payment of members, and applicability to the Council of laws applicable to BPA, and vests exclusive jurisdiction for review of the Council's actions in the United States courts. 16 U.S.C. §§ 839b(a)(2), (3), and (4). The Congress also specified internal Council procedures, including a majority as a quorum, voting prerequisites for approval of a Plan, public disclosure and input, and payment of compensation and expenses of the Council by the Administrator of BPA. 16 U.S.C. §§ 839b(c)(2), (3), and (10).



The Congress also specified details of the Plan to be prepared by the Council, including priorities relating to conservation, renewable resources and generating resources, 16 U.S.C. § 839b(e)(1), the elements of the Plan, 16 U.S.C. § 839b(e)(3), details of MCS (including geographic and climatic differences within the region and financial assistance to be made available to consumers), 16 U.S.C. § 839b(f)(1), and imposition of a surcharge on those customers which do not implement MCS, 16 U.S.C. § 839b(f)(2). Perhaps most importantly, the subject matter of the Council's activities for which such detail is specified is an area of traditionally federal, rather than state, control.

Consistent with the substantive details of the Regional Power Act, participation of the states was limited to the formality of providing for the appointment of members to the Council. See 16 U.S.C. § 839b(a)(2); Idaho Code §§ 61-1201-1207; Mont. Code Ann. §§ 90-4-401-404; Or. Rev. Stat. §§ 469.800-845; and Wash. Rev. Code Ann. §§ 43.52A.010-050. In view of the Regional Power Act's detailed provisions, the state statutes do not, nor could they under the preemption doctrine, define the Council's obligations or authority. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). The Congress simply left no room for state law to specify any substantive aspects of the Council or its authority.

Although the Council members may "serve" pursuant to the state appointment statutes, it is clear from the Regional Power Act that the Council exercises its authority "pursuant" to that Act and that such was the intent of Congress (despite its disclaimer that the Council should

not be considered an "agency or instrumentality of the United States," 16 U.S.C. § 839b(a)(2)(A)).<sup>4</sup>

As to the requirement that the Council exercise significant authority, Judge Beezer's dissent to the Ninth Circuit's decision in this case accurately documents the significant authority the Council exercises through its promulgation of the Plan and BPA's obligation to comply with that plan. 786 F.2d at 1375-76; *see also* discussion in Part II, *infra* at p. 11. Moreover, the Council does not argue that it lacks significant authority over BPA.

The Council exercises significant authority pursuant to the laws of the United States. Council members are not appointed by the President or the Secretary of Energy as required by the appointments clause of the United States Constitution. U.S. Const., art. II, § 2, cl. 2. Consequently, the Council's actions establishing MCS as part of the Plan are contrary to the Constitution and void. *Buckley*, 424 U.S. at 126, 143.

## **II. The Question of the Council's Constitutionality is Ripe for Review and Presents a Justiciable Case or Controversy**

The United States, as an intervenor before the Ninth Circuit, argued that the constitutional issues raised in this case are not ripe for review because MCS is only a rec-

---

<sup>4</sup>Congress recognized the constitutional difficulties manifest in the establishment of the Council in its present form and provided for the alternative establishment of the Council as a federal agency. 16 U.S.C. § 839b(b). Consequently, the unconstitutionality of the Council in its present form will require reappointment of its members consistent with law, but will not destroy the underlying structure of the Council.

ommendation which need not be implemented by BPA and, therefore, the Council exercises no significant authority over BPA in this regard. The ICUA anticipates the United States will again raise this argument in opposition to the Petition for Writ of Certiorari. The Council's promulgation of MCS as part of the Plan is an exercise of significant authority over BPA which impacts both ICUA and the Petitioners. Consequently, the constitutional issues in this case are ripe for review and present a justiciable case or controversy.

The Regional Power Act mandates that all actions of the Administrator of BPA regarding conservation and resource acquisition "shall be consistent with the plan..." 16 U.S.C. § 839b(d)(2). The Regional Power Act further provides that "[t]he Administrator *shall* acquire such resources through conservation, *implement all such conservation measures*, and acquire such renewable resources . . . as the Administrator determines are consistent with the plan. . . ." 16 U.S.C. § 839d(a)(1) (emphasis added). The Plan provides that both residential and commercial MCS are *nondiscretionary* resources. 1986 Plan, Vol. I, Table 8-3 at p. 8-7. Consequently, if the Administrator is to act consistently with the Plan he *must* implement residential and commercial MCS. The BPA has no discretion in this regard.<sup>5</sup>

---

<sup>5</sup>The United States correctly argued to the Ninth Circuit that the Council can only recommend imposition of a surcharge as a penalty for those customers who fail to adopt MCS. This, however, does not change the fact that §§ 839b(d)(2) and 839d(a)(1) require BPA to implement MCS. The constitutional implications arise in the Council's authority to direct BPA to implement MCS not in the question of how BPA chooses to accomplish implementation.

Whether MCS is implemented through voluntary adoption or by the imposition of surcharges or other economic "encouragement," implementation will have a real and substantial impact on ICUA members and their retail customers, as well as the members of the building trades who are petitioners in this action. The constitutional issues presented are ripe for review and are the subject of a justiciable case or controversy. See *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 297-98 (1979); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

There is another important reason why the constitutional issues presented by this case should be resolved at this time. The Ninth Circuit held that the Council's interpretation of the statutory requirement that MCS be "economically feasible for consumers" was entitled to substantial deference and will be upheld if reasonable. 786 F.2d at 1367. The Ninth Circuit relied upon the well-established rule that the construction of a statute by the agency charged with its administration is entitled to substantial deference. *Id.* at 1366. As a result, the Ninth Circuit has compounded its error of giving constitutional sanction to the state political appointees' exercise of directory authority over BPA by deferring to those same state political appointees' interpretation of the statute which gives them their power—a statute drafted and passed by the Congress of the United States.

The Ninth Circuit has generously allowed the Council to have its cake and eat it too! Surely, even the expansive limits of what the Ninth Circuit perceives as "an innovative system of federalism" are stretched beyond the breaking point in this case.

The constitutional issues in this case were ripe for decision by the Ninth Circuit and the Ninth Circuit's decision has amplified the need for this Court to resolve those issues.<sup>6</sup>

### **III. The Council Was Not Established Nor Does it Operate Pursuant to an Interstate Compact**

The Council does not possess the characteristics of a body established by an interstate compact. An interstate compact has been described as having the following characteristics:

To delineate the essence of the interstate compact, it may be emphasized that it has the following characteristics: 1. It is formal and contractual. 2. It is an agreement between the states themselves, similar in content, form, and wording to an international treaty, and usually embodied in state law in an identifiable and separate document called the "compact." 3. It is enacted in substantially identical words by the legis-

---

<sup>6</sup>The United States may also argue the constitutional issues are not ripe because the Ninth Circuit did not decide if the Council exercises significant authority over BPA (relying on the Ninth Circuit's statement that it is "immaterial whether [the Council members] exercise some significant executive or administrative authority over federal activity." 786 F.2d at 1365.). As noted, the Regional Power Act itself clearly authorizes the Council to exercise significant authority over BPA. Further, the Ninth Circuit's decision upholding the constitutionality of the Council implicitly recognizes the Council's directory authority over BPA. In any event, any uncertainty as to the Council's authority over BPA which may exist in the wake of the Ninth Circuit's decision is a sufficient basis for review by this Court. In order to effectively plan for and engage in future operations, the electric cooperatives comprising ICUA, and presumably the petitioner building trades organizations, must know what authority the Council will have in MCS and other critical power supply matters.

lature of each compacting state. 4. At least in certain cases, consent of Congress must be obtained; in all cases, Congress may forbid the compact by specific enactment. 5. It can be enforced by suit in the Supreme Court of the United States if necessary. 6. It takes precedence over an ordinary state statute.

F. ZIMMERMAN & M. WENDELL, *THE INTERSTATE COMPACT SINCE 1925* § 42 (1951); see *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, — U.S. —, 105 S. Ct. 2545 (1985); *Virginia v. West Virginia*, 246 U.S. 565 (1918); *Virginia v. Tennessee*, 148 U.S. 503 (1893).

#### **A. No Formal and Contractual Agreement Exists**

Title 61, Sections 1201-1207, Idaho Code, do not provide for any formal agreement with other states. Those statutes simply provide that Idaho agrees to participate in the formation of a council "created pursuant to the Pacific Northwest Electric Power Planning and Conservation Act." Idaho Code § 61-1201. Under Idaho law, interstate compacts are treated as formal contracts enacted into state law pursuant to legislative action. Interstate compacts to which the state of Idaho is a party are set forth in Idaho Code §§ 42-3401-3404. For example, in ratifying the Snake River Compact, the State of Idaho set forth the formal contract in state law. Idaho Code § 42-3401. Similarly, the Bear River Compact is found at Idaho Code § 42-3402 and the Anadromous Fish Compact with Oregon and Washington is found at Idaho Code § 42-3404.

In this case, no formal or express activity occurred in any of the states involved. No state legislation exists which can be referred to as a formal and contractual

agreement with any other state. Idaho Code §§ 61-1201-1207; Mont. Code Ann. §§ 90-4-401-404; Or. Rev. Stat. §§ 469.800-845; and Wash. Rev. Code Ann. §§ 43.52A.010-050. Hence, no compact was created.

**B. No Agreement Exists Between the States of Idaho, Montana, Oregon or Washington**

There is no identifiable document which evidences an agreement between the states of Idaho, Montana, Oregon or Washington. Title 61, Sections 1201-1207, Idaho Code, do not mention the states of Montana, Oregon or Washington. The Idaho statutes do not evidence any intent on the part of the state of Idaho to contract, compact or agree with any entity regarding the Council. The Idaho appointment legislation simply provides that the State of Idaho will participate in a council created by federal statute. Idaho Code § 61-1201.

Similarly, Or. Rev. Stat. § 469.800 refers only to Oregon's "participation in the Pacific Northwest Electric Power and Conservation Planning Council." The Oregon statutes contain no reference to the other three states, nor do they reflect any intent to enter into a contract, compact or agreement with any other state. Or. Rev. Stat., §§ 469.800-845. The Montana and Washington statutes also do not manifest an intent to enter into a compact, contract or agreement with any other state. Mont. Code Ann. §§ 90-4-401-404; Wash. Rev. Code Ann. §§ 43.52A.010-050.

Consequently, the state statutes applicable to the Council do not create any agreement among the states.



### **C. The State Statutes Do Not Use Substantially Identical Language**

A comparison of Idaho, Montana, Oregon and Washington statutes appointing members to the Council reveals significant differences in the statutory language. Idaho allows the Governor to appoint two state officers to the Council. These positions are administratively structured within the office of the Governor. Idaho Code § 61-1202. The Council members from Idaho serve at the pleasure of the Governor. Idaho Code § 61-1203. Similarly, members of the Council representing Montana and Washington are appointed by and serve at the pleasure of the Governor. Mont. Code Ann. § 90-4-402; Wash. Rev. Code Ann. § 43.52A.030-43.52A.040.

Under Oregon law, however, Council members for Oregon are considered full-time state public officials serving a fixed term and may not be removed at the pleasure of the Governor. Or. Rev. Stat. §§ 469.805, 815, 820.

Although Idaho, Montana and Washington have similar appointment provisions, such provisions are distinct from those of Oregon.

### **D. The Regional Power Act Does Not Contain Sufficient Language or Indication of Congressional Consent to the Creation of an Interstate Compact Agency in the Form of the Council**

The Congressional Declaration of Purpose expresses an intent to provide for participation and consultation of the Pacific Northwest states, local governments, consumers, customers, users of the Columbia River system, and the public at large within the region for the development of

regional energy plans and fish and wildlife programs. 16 U.S.C. § 839. Although it is evident from the language of Section 4 of the Act, 16 U.S.C. § 839b, that Congress was concerned with the potential constitutional infirmities of the Regional Power Act and attempted to couch the establishment of the Council in terms of an "agreement" between the states, the Congress stopped short of specifying establishment through an interstate compact. Reference to an interstate compact is conspicuously absent from the Regional Power Act. Moreover, the legislative history of the Regional Power Act does not support the creation of an interstate compact. *See* H.R. Rep. No. 976 (Pt. I), 96th Cong., 2d Sess. (1980); H.R. Rep. No. 976 (Pt. II), 96th Cong., 2d Sess. (1980); S. Rep. No. 272, 96th Cong., 1st Sess. (1979).

The Regional Power Act and its legislative history do not evidence congressional intent to consent to the creation of an interstate compact as the vehicle for establishing the Council.

#### **E. The Activities of the Council Do Not Take Precedence Over State Statutes**

The Idaho appointment legislation specifically reserves to the state the various areas of state law which would logically be subject to the jurisdiction of the Council, were it a compact agency. Idaho Code, § 61-1201 provides:

Nothing in this agreement shall be construed to alter, diminish or abridge the rights of the state of Idaho and its citizens with respect to any water or water related right and those relating to the regulation of the energy industry.

There are no statutory provisions which indicate the plans or programs promulgated by the Council were intended

to be superior to any conflicting state statutes. The state of Idaho has not manifested any intent that, by placing members on the Council, it has subordinated its own statutory provisions to the plans or programs promulgated by the Council pursuant to and consistent with any interstate compact.

In sum, the Regional Power Act and the state appointment statutes do not exhibit the characteristics of an interstate compact. Despite its attempt to avoid the constitutional difficulties establishment of the Council under the Regional Power Act and activities pursuant to that Act would create, Congress did not create an interstate compact nor did it intend to create an interstate compact. Moreover, the state appointment statutes clearly do not contemplate the Council as a creature of an interstate compact.

---

## CONCLUSION

The Ninth Circuit's decision in this case allows the Congress to dilute the constitutional powers of the executive branch by granting to state political appointees the authority to exercise directory authority over a federal agency, in violation of the appointments clause and supremacy principles of the United States Constitution. The actions of the unlawfully constituted Council have a substantial and direct impact on the ability of ICUA members and their customers to maintain an economical power supply.

For the above-stated reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

ROY L. EIGUREN

Counsel of Record, and

STEVEN R. ORMISTON

LINDSAY, HART, NEIL & WEIGLER

Jefferson Place, Suite 400

350 N. Ninth Street

Boise, Idaho 83702

(208) 336-8844

*Attorneys for Amicus Curiae*

December 10, 1986.



# A-1

## APPENDIX A

### EFFECT OF A 10% RATE SURCHARGE

#### ON SALMON RIVER ELECTRIC COOPERATIVE CHALLIS, IDAHO

Customer Growth:

	<u>Total</u>	<u>New Residential Buildings</u>	<u>New Commercial Buildings</u>
Dec 1981	2403	5	1
Dec 1982	2584	4	0
Dec 1983	2466	3	1
Average		<u>4</u>	<u>.67</u>

Potential KWH Savings due to MCS:

#### New Residential:

<u>Average Sq.ft.</u>	<u>Estimated Zone 3 W/O MCS</u>	<u>KWH/Sq.ft./Yr. W/MCS</u>	<u>Savings</u>
(1325)	(9.0	— 3.1)	= 7818
(4 Residential Bldgs)	(7818 KWH/Bldg/Yr) = 31,272 KWH of potential residential savings		

#### New Commercial

<u>Average Sq/ft.</u>	<u>Estimated KWH/Sq.ft./Yr Savings W/MCS</u>	<u>Savings</u>
(10,000)	(.00013)(8760)	= 11,388
(.67 Comm'l Bldgs)	(11,388 KWH/Bldg/Yr) = 7,630 KWH of potential commercial savings	
31,272	+ 7,630	= 38,902 KWH of Potential Savings of Incremental Load

Estimated Surcharge should MCS not be adopted:

August 1983—July 1984 power purchases	\$4,372,795
Anticipated PF-85 rate increase @10%	437,280
Estimated 1986 power purchases @0% growth	\$4,810,075
Estimated Surcharge @10%	\$ 481,008

## A-2

Estimated Surcharge/KWH of Incremental Load:

$$\frac{\$481,008}{38,002 \text{ KWH}} = \$12.36/\text{KWH}$$

Estimated Additional Cost to Provide Incremental Load:

$$\begin{array}{l} \text{NR-85} \\ (\$0.0276/\text{KWH})(38,902 \text{ KWH}) = \$1,074 \end{array}$$

Surcharge to Cost Ratio:

$$\begin{array}{l} \$481,008/\$1,074 = 448:1 \\ \text{A 1:1 ratio would indicate ideal cost tracking} \end{array}$$

Estimated Effect on SREC Rates:

Total Cost of Electric Service (12/83)	\$ 3,292,248
Less 12/83 Purchased Power Actual	(2,214,883)
Add Estimated 1986 Purchased Power at PF-85	<u>4,810,075</u>

Estimated 1986 Total Cost of Electric Service W/o Surcharge	\$ 5,887,440
Add Surcharge	<u>481,008</u>

Estimated 1986 Total Cost of Electric Service W/ Surcharge	\$ 6,368,448
---------------------------------------------------------------	--------------

$$\$6,368,448/\$5,887,440 = 1.0817$$

An 8.2% systemwide rate increase would be necessitated by the Surcharge.





No. 86-629

Supreme Court, U.S.  
**FILED**

**DEC 19 1986**

JOSEPH E. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

SEATTLE MASTER BUILDERS ASSOCIATION, *et al.*,  
*Petitioners,*

v.

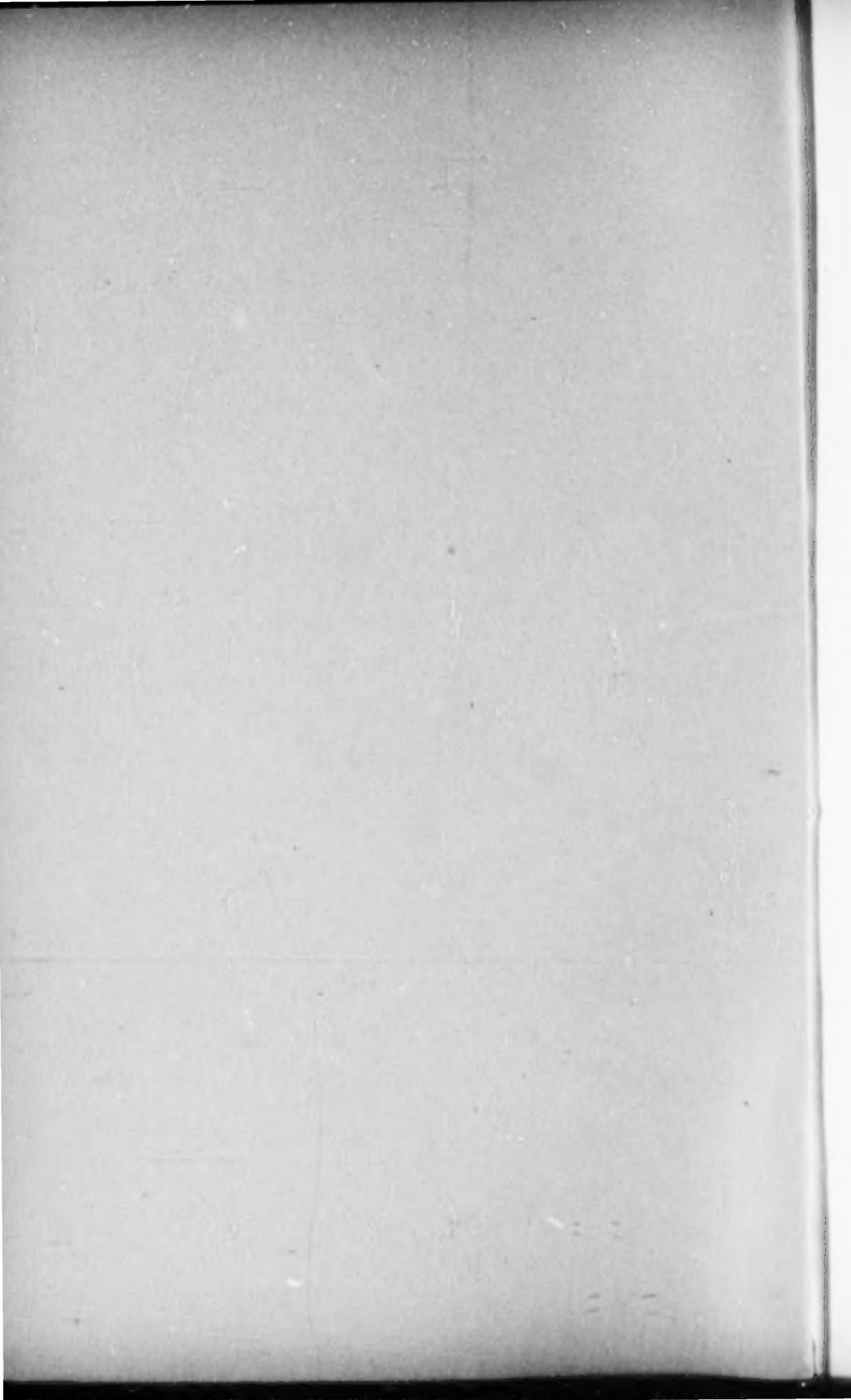
PACIFIC NORTHWEST ELECTRIC POWER AND  
CONSERVATION PLANNING COUNCIL,  
*Respondent,*  
UNITED STATES OF AMERICA,  
*Intervenor-Respondent.*

BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION OF HOME BUILDERS  
IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

GUS BAUMAN\*  
WILLIAM H. ETHIER  
GARY KOMAROW  
National Housing Center  
15th & M Streets, N.W.  
Washington, D.C. 20005  
(202) 822-0359

\**Counsel of Record*

December 12, 1986



## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICUS CURIAE .....	1
ARGUMENT .....	1
I. THIS CASE IS VITALLY IMPORTANT TO THE PEOPLE OF THE PACIFIC NORTH- WEST AND, POTENTIALLY, TO EVERY PERSON IN THE UNITED STATES .....	1
A. The Pacific Northwest Power Planning Council's Actions Will Significantly And Adversely Affect the Costs of Housing and Electricity for Consumers in the Pa- cific Northwest .....	1
B. What Has Happened in the Pacific North- west Could Happen Elsewhere in the United States .....	3
C. The Council's Conservation Standards Will Have a Tremendous Impact on the Cost and Affordability of Housing if Adopted Nationwide .....	5
II. THE NINTH CIRCUIT VIOLATED SUPREME COURT PRECEDENT IN DE- FERRING TO THE <i>POST HOC</i> INTER- PRETATION OF THE ACT BY THE COUNCIL'S ATTORNEYS .....	6
CONCLUSION .....	12

## TABLE OF AUTHORITIES

CASES:	Page
<i>ALCOA v. Central Lincoln Peoples' Util. Dist.</i> , 467 U.S. 380 (1984) .....	9
<i>American Paper Inst., Inc. v. American Elec. Power Service Corp.</i> , 461 U.S. 402 (1983) .....	9
<i>Burlington Truck Lines, Inc. v. United States</i> , 371 U.S. 156 (1962) .....	10
<i>Central Lincoln Peoples' Util. Dist. v. Johnson</i> , 673 F.2d 1076, as amended, 686 F.2d 708 (9th Cir. 1982), <i>rev'd on other grounds</i> , 467 U.S. 380 (1984) .....	9
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984) .....	9
<i>Columbia Basin Land Protection Ass'n v. Schlesinger</i> , 643 F.2d 585 (9th Cir. 1981) .....	9
<i>Dept. of Water &amp; Power v. Bonneville Power Administration</i> , 759 F.2d 684 (9th Cir. 1985) .....	9
<i>Motor Vehicle Manufacturers Ass'n of the U.S. v. State Farm Mutual Automobile Ins. Co.</i> , 463 U.S. 29 (1983) .....	11
<i>Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council</i> , 786 F.2d 1359 (9th Cir. 1986) .....	9
<i>Securities and Exchange Comm'n v. Chenery Corp.</i> , 332 U.S. 194 (1947) .....	10
<i>Udall v. Tallman</i> , 380 U.S. 1 (1965) .....	9
<i>Unemployment Compensation Comm'n v. Aragon</i> , 329 U.S. 143 (1946) .....	9
STATUTES:	
16 U.S.C. § 839a(14) .....	2
33 U.S.C. § 1508(b)(1) .....	4
LEGISLATIVE MATERIALS:	
H.R. Bill 3074, 99th Cong., 1st Sess. (July 24, 1985) .....	3
H.R. Bill 3074 § 103(3) .....	4

## Table of Authorities Continued

	Page
H.R. Bill 3074 § 106(e)(1) .....	4
H.R. Bill 3074 § 106(e)(2) .....	4
H.R. Bill 5766, 98th Cong., 2d Sess. (May 31, 1984) .....	3
H.R. Bill 5766 § 103(3) .....	4
H.R. Bill 5766 § 106(e)(1) .....	4
H.R. Bill 5766 § 106(e)(2) .....	4
 OTHER AUTHORITIES:	
U.S. Department of Commerce, Bureau of the Cen- sus, <i>Construction Reports, Housing Starts</i> , Table 7 (August 1986) .....	5
U.S. Department of Labor, Bureau of Labor Sta- tistics, <i>Employment &amp; Earnings</i> , Table B-1 (September 1986) .....	6
<i>United States Department of Commerce News</i> , Bu- reau of the Census, Table 1 (October 1, 1986) .....	5,6





## INTEREST OF THE AMICUS CURIAE

The National Association of Home Builders represents 142,000 builder and associate members organized in approximately 800 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

For the reasons stated below, this case is of obvious and direct importance to both the home building industry and housing consumers.

The National Association of Home Builders has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioners and has filed their letters of consent with the Clerk of this Court.

## ARGUMENT

### I. THIS CASE IS VITALLY IMPORTANT TO THE PEOPLE OF THE PACIFIC NORTHWEST AND, POTENTIALLY, TO EVERY PERSON IN THE UNITED STATES

#### A. The Pacific Northwest Power Planning Council's Actions Will Significantly and Adversely Affect the Costs of Housing and Electricity for Consumers in the Pacific Northwest

This case concerns the adoption by the Pacific Northwest Electric Power and Conservation Planning Council (the Council) of a Regional Electrical Power Plan (the Plan) for the states of Washington, Oregon

and Idaho, as well as parts of Montana, California, Nevada, Utah and Wyoming.<sup>1</sup> The Plan includes a set of Model Conservation Standards (MCS) that are the focal point of NAHB's concern in this matter. These standards will significantly affect the costs of housing in the areas covered by the Plan. The Council itself estimated that the MCS' space heating requirements alone will add \$1,900 to the cost of a single-family home west of the Cascades, and \$3,000 east of the Cascades. This comes to almost \$200 million in new single-family housing costs each year, or some \$3.35 billion during the plan's 17-year course. Pet. for Cert. 29, n.20.<sup>2</sup>

---

<sup>1</sup> The Council's jurisdiction is defined by Section 3(14) of the Pacific Northwest Electric Power Planning and Conservation Act (the Act), 16 U.S.C. § 839a(14).

<sup>2</sup> While the Petition for Certiorari concedes for the sake of argument the correctness of the Council's figures, the home building industry does not in fact agree. The Council developed alternative packages of conservation measures it believed would meet its 4¢/kwh conservation standard. Plan Vol. II, Tables J6-1a to J6-1c. For the package of conservation measures labeled "Type A" in Table J6-1a, in the Council's 1,350 square foot prototype single-family house built west of the Cascade Mountains, the Council estimates increased space heating conservation costs of approximately \$1,900 in 1980 dollars. See Plan Vol. II, Tables J6-1a, K-14 & K-15.

However, the Pacific Power & Light Company's estimate was approximately \$2,800 to \$4,500; the Puget Sound Power & Light Company's estimate was approximately \$3,800, the Seattle Master Builders Association's estimate was approximately \$4,800, the NAHB's estimate was approximately \$4,900 and Breeden Bros. Inc.'s estimate was approximately \$7,100. Official Record of the Northwest Power Planning Council Docs. 311/01002, 311/00989, 321/02310 (Enclosure 6), 311/03445 & 321/02392, re-

This is a case of a governmental body of questionable authority promulgating ill-conceived and illegal standards. Although the Court should answer the significant federal question of whether the Council is a valid interstate compact or a federal agency,<sup>3</sup> the Court should also rule that the Council's Plan is defective and that it must be reconsidered by a properly constituted Council and brought into compliance with Congressional intent regarding economic feasibility for the consumer. *See* Pet. for Cert. 24-30.

**B. What Has Happened in the Pacific Northwest Could Happen Elsewhere in the United States**

During each of the last two Congresses, bills have been introduced that would authorize the formation of interstate compact agencies similar to the council. H.R. Bill 3074, 99th Cong., 1st Sess. (July 24, 1985); H.R. Bill 5766, 98th Cong., 2nd Sess. (May 31, 1984). Under these bills, compact agency members would be

---

spectively.

The Plan shows increased costs of approximately \$3,000 for "Type A" conservation in the Council's prototype home east of the Cascade Mountains in Oregon, Washington, Idaho and Montana, where the climate is more severe. *See* Plan Vol. II, Tables J6-1b, J6-1c, K-14 & K-15. The NAHB's estimate for such a home was between approximately \$7,800 and approximately \$8,200. Official Record of the Northwest Power Planning Council Doc. 311/03445.

The NAHB has been unable to determine the Council's per unit estimate of increased costs of multi-family housing. The Seattle Master Builders Association estimated that the increased cost west of the Cascade Mountains would be approximately \$3,500. Official Record of the Northwest Power Planning Council Doc. 321/02310 (Enclosure 6).

<sup>3</sup> *See* Pet. for Cert. 11-20.

appointed by the States and exercise control over a federal agency. H.R. Bill 3074 §§ 103(3), 106(e)(2); H.R. Bill 5766 §§ 103(3), 106(e)(2). These bills would allow the state-appointed agency to apply to the Federal Energy Regulatory Commission (FERC) for an order compelling electric utilities to provide or modify transmission services. H.R. Bill 3074 § 106(e)(1); H.R. Bill 5766 § 106(e)(1). FERC would be compelled to issue the proposed order except in very limited circumstances:

Upon receipt of an application under this subsection, and after public notice and notice to each affected electric utility and opportunity for an evidentiary hearing, the Commission *shall issue such order* unless the Commission finds that the order would unreasonably impair the reliability of an electric utility affected by the order or would impair the ability of such an electric utility to render adequate service to its customers or consumers.

H.R. Bill 3074 § 106(e)(2) (emphasis added); H.R. Bill 5766 § 106(e)(2) (emphasis added).

The Petition for Certiorari discusses at length the significant constitutional issues raised by state appointment of a body which exercises control over a federal agency. Pet. for Cert. 11-20. The above-quoted provision of the proposed bills demonstrates the prospect of continuing and expanding this type of regional government throughout the United States. *See also* 33 U.S.C. § 1508(b)(1) (Deep Water Ports Act) (state governor veto over port location approved by the Secretary of Transportation).

The significance of the two bills' similarity to the Act is this: as future interstate compact agencies are formed, the outcome of this case could become precedent affecting every person in the United States who uses electricity, builds homes, sells building supplies, or will buy or live in a new home—i.e., literally everyone in the United States. Now is the time to insure that the correct precedent is set, before other agencies are created and have acted.

**C. The Council's Conservation Standards Will Have a Tremendous Impact on the Cost and Affordability of Housing if Adopted Nationwide**

While the Petition for Certiorari explains the regional effect of the Council's conservation standards, Pet. for Cert. 29-30 & nn. 19-23, it does not describe the potential effect throughout the rest of the nation. Approximately 1,742,000 privately owned housing units were started in the U.S. in 1985. U.S. Department of Commerce, Bureau of the Census, *Construction Reports, Housing Starts*, Table 7 (August 1986). The value of new housing units put in place by the private sector in the United States in 1985 was \$115,974,000,000. *United States Department of Commerce News*, Bureau of the Census, Table 1 (October 1, 1986). Even an increase of just \$1,900 per unit, the Council's estimate in 1980 dollars of the cost of their conservation standards in single-family homes in a moderate climate (Plan Vol. II, Tables J6-1a, K-14 and K-15) would add \$3,309,800,000 to the annual cost of privately owned housing nationwide. If NAHB's estimate of \$4,900 is used, the total annual added cost would be \$8,535,800,000 nationwide. Official Record of the Northwest Power Planning Council, Doc. 311/03445. This has definite effects on the



housing consumer. If only \$1,000 is added to the mortgage amount for an average priced, new single-family home, at a 10% interest rate for a 30-year loan, *then the number of American families who can afford the average priced home drops by 1.6%, or 325,000 families.* NAHB Economics, Mortgage Finance and Housing Policy Division. The potential nationwide impact on the ability of people to afford homes is dramatic.

The construction industry as a whole employed 4,687,000 people in 1985. U.S. Department of Labor, Bureau of Labor Statistics, *Employment and Earnings*, Table B-1 (September 1986). While the exact number employed by the housing industry is not available, a rough estimate of the magnitude is possible in light of the fact that private construction of new housing units accounted for 33% of the total construction in the United States in 1985. *United States Department of Commerce News*, Bureau of the Census, Table 1 (October 1, 1986). A shrinking housing market, which would be caused by any increase in housing costs, would seriously affect the economy in general and employment in particular.

## **II. THE NINTH CIRCUIT VIOLATED SUPREME COURT PRECEDENT IN DEFERRING TO THE POST-HOC INTERPRETATION OF THE ACT BY THE COUNCIL'S ATTORNEYS**

The Petition for Certiorari discusses the Council's substitution of its interpretation of the Act for the intent of Congress, and the Ninth Circuit's incorrect deference thereto. Pet. for Cert. 24-30. NAHB submits that there are other important reasons why the Ninth Circuit should not have sustained the Council's actions. The Council failed to explain why it acted

contrary to its earlier interpretation of the Act's requirement that the Model Conservation Standards be "economically feasible for consumers." In sustaining the Council's actions, the Ninth Circuit erroneously deferred to the *post hoc* rationalizations of the Council's attorneys, rather than the record before the Council.

Until the petitioners filed this case, the Council's interpretation of "economically feasible for consumers" agreed with the intent of Congress.<sup>4</sup> Specifically, the Council indicated early and repeatedly that it interpreted the Act to require that no cost-effective conservation measure with a marginal cost greater than the average cost electric rate may be required by the Plan unless the buyers of new homes are reimbursed for the difference in cost.

By way of background, at the seventh of the forty-three Council meetings leading to adoption of the Plan, representatives of the Seattle Master Builders Association (the Master Builders) expressed concern that the Council would require marginal cost conservation in new housing without reimbursing new home buyers for the difference between the cost of the marginal cost conservation measures and average cost electric rates. Mtg. 7, T. at 1a-14 to 15, 1b-4 to 1b-9 (July 13, 1981) (contained in Pet. for Cert. App. X). The Council members were fully aware of their statutory duty to provide such reimbursement. Indeed, the Council members became somewhat impatient with the Master Builders' implication that the

---

<sup>4</sup>The intent of Congress is explained in the Petition for Certiorari at 24-27.



Council might not do as the Act requires. *See* Mtg. 7, T. at 1a-14 and 15, 1b-4 to 1b-9.

Additionally, at the thirty-sixth Council meeting, all eight members of the Council formally voted to adopt a position that reimbursement must be offered to consumers to achieve standards set at a marginal resource cost level. Mtg. 36, M. at 1, 4 (December 28, 1982) (contained in Pet. for Cert. Appx. W at W-3 to W-4, adopting Staff Recommendation 3 of the Official Record of the Power Council, Doc. 440/01494, contained in Pet. for Cert. App. V at V-4 to V-7).

The Council knew that the Act does not allow it to require new housing conservation measures based upon the region's marginal cost without reimbursing consumers for the difference between that cost level and average cost electric rates. However, that is precisely what the Council did. The Plan set a marginal cost standard for conservation in new housing (Plan Vol. I, 7-1, 10-4, 10-9 to 10-11), but after December 31, 1985, the Plan provides no reimbursement to consumers for the difference between the marginal cost of new housing conservation measures and average cost electric rates. Plan Vol. I, 10-9 to 10-11.

Contrary to the contention of the Ninth Circuit, the statutory interpretation to which it deferred was not the Council's but the interpretation of the Council's *attorneys*. Neither the Council's actions nor the record offer any explanation of why the Council chose to act contrary to its previously adopted interpretation. Neither the Council's actions nor the record contain any supporting analysis for this action. Indeed, *there is no indication that the Council was even aware that it was acting contrary to its own adopted interpretation.*

It was only after the Council's action that an explanation finally emerged in the legal brief of its attorneys. This came in the Council's Reply Brief at 54-57, which was not filed until December 1984.<sup>5</sup> The Ninth Circuit attempts to justify its position as a valid deference to agency interpretation of its statute: "Petitioners have not shown the Council's definition of economic feasibility to be unreasonable." *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d 1359, 1369 (9th Cir. 1986). However, the cases cited by the Ninth Circuit are totally inapposite because, here, *the interpretation was not the agency's*.<sup>6</sup> This Court has drawn a hard line between interpretations of administrative agencies, to which it has granted some deference, and *post hoc* explanations by agency attorneys, which the Court has rejected:

---

<sup>5</sup> The Council record closed in April 1983.

<sup>6</sup> The Ninth Circuit cited the following cases to justify the deference it granted to the interpretation. 786 F.2d at 1366-67. The cases put the burden on the petitioners to prove the interpretation is not reasonable. *American Paper Inst., Inc. v. American Elec. Power Service Corp.*, 461 U.S. 402, 422-23 (1983), quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965), and *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *ALCOA v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984); *Dept. of Water & Power v. Bonneville Power Administration*, 759 F.2d 684, 690-91 (9th Cir. 1985); *Central Lincoln Peoples' Util. Dist. v. Johnson*, 673 F.2d 1076, 1078, *as amended*, 686 F.2d 708, 710-11 (9th Cir. 1982), *rev'd on other grounds*, 467 U.S. 380 (1984); *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 599-600 (9th Cir. 1981), and cases cited therein.

The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; [*Securities and Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947)] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself:

"[A] simple but fundamental rule of administrative law \* \* \* is \* \* \* that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action \* \* \*." *Ibid.*

For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate, (see *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 197), the administrative process, for the purpose of the rule is to avoid "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." 332 U.S. at 196.

*Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962).

The Council's failure to explain why it changed course and acted contrary to its own interpretation

of the Act violates the requirement that an agency articulate a satisfactory explanation for its actions. In *Motor Vehicle Manufacturers Ass'n of the U.S. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), a group of insurance companies challenged the legality of the National Highway Traffic Safety Administration's (NHTSA) decision to rescind its requirement that automobile manufacturers install "passive restraints," such as airbags. *Id.* at 35-38, 40. The rescission was invalid because NHTSA "failed to present an adequate basis and explanation" for its action. *Id.* at 34. This Court criticized the adequacy of the agency's explanation of its decision to rescind one portion of the passive restraints requirement, and criticized the agency's failure to give any explanation for its decision to rescind another portion. *Id.* at 49-50, 52-57. NHTSA had at least the same obligation to explain its decision to change course and rescind a proposed action as it did to explain a proposed action to begin with. *Id.* at 42-43.

The same principle should be applied in the present case. The Council should have at least told the public why it was no longer going to do something it previously had acknowledged was required under its statutory mandate, and given the public the opportunity to respond in a meaningful way prior to the change.

Administrative agencies must be held accountable for their actions. They must abide by the standards set by Congress, Pet. for Cert. 27, 28-29, and they must abide by their own standards and the record before them. Only when they have given notice of the proposal to change their standards, given the public an opportunity to be heard, and filed in the official record an analysis and explanation of the changes,

should they be allowed to make them, and then only if they conform to the will of Congress. To do otherwise is to act arbitrarily and capriciously.

### CONCLUSION

For the reasons stated above and in the Petition for Certiorari, this Court should issue a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

GUS BAUMAN\*

WILLIAM H. ETHIER

GARY KOMAROW

National Housing Center

15th & M Streets, N.W.

Washington, D.C. 20005

(202) 822-0359

*\*Counsel of Record*

December 12, 1986



**AMICUS**

**BR**



**CURIAE**

**IEF**

DEC 23 1986

JOSEPH F. SPANIOL, JR.  
CLERK

9  
No. 86-629

In The  
**Supreme Court of the United States**

October Term, 1986

— 0 —  
SEATTLE MASTER BUILDERS  
ASSOCIATION, *et al.*,

*Petitioners,*

v.

PACIFIC NORTHWEST ELECTRIC POWER  
AND CONSERVATION PLANNING COUNCIL,

*Respondent.*

UNITED STATES OF AMERICA,

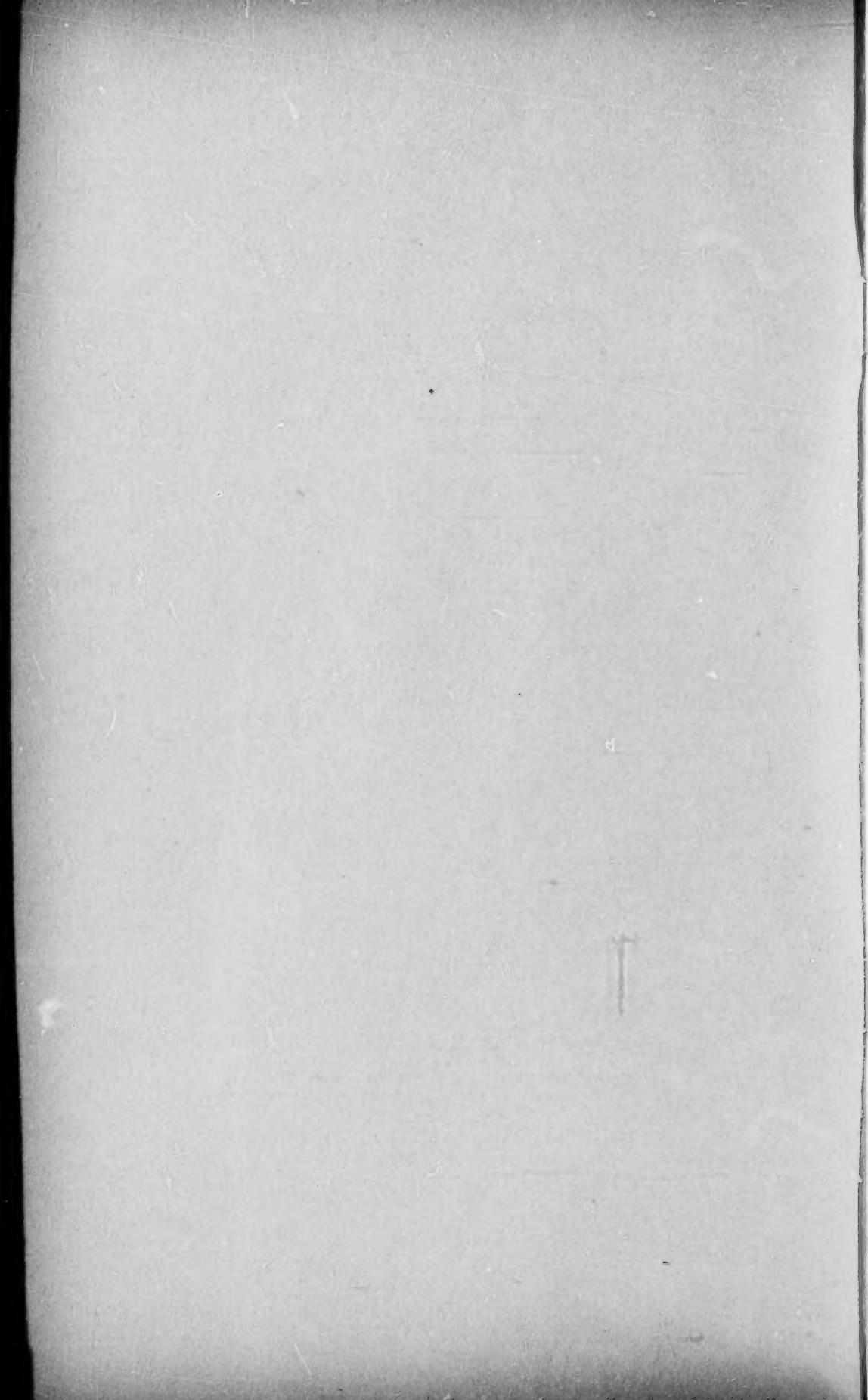
*Intervenor-Respondent.*

— 0 —  
On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

— 0 —  
**BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

— 0 —  
RONALD A. ZUMBRUN  
\*ROBIN L. RIVETT  
\*COUNSEL OF RECORD  
Pacific Legal Foundation  
555 Capitol Mall, Suite 350  
Sacramento, California 95814  
Telephone: (916) 444-0154

*Attorneys for Amicus Curiae,  
Pacific Legal Foundation*



## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED .....	ii
INTEREST OF AMICUS .....	1
OPINION BELOW .....	3
STATEMENT OF THE CASE .....	3
SUMMARY OF ARGUMENT .....	3
I. THE NINTH CIRCUIT HAS CREATED A GIANT LOOPHOLE IN ENVIRONMENTAL PROTECTION WHICH WILL LEAD TO AVOIDANCE OF ENVIRONMENTAL LAWS	4
A. NEPA Mandates That an EIS Be Prepared- Assessing the Northwest Power Plan .....	8
1. The Northwest Power Planning Council Is a Federal Agency for the Purposes of NEPA and Should Have Filed an En- vironmental Impact Statement .....	8
2. If the Council Is Not a Federal Agency for NEPA Purposes, BPA Is, and BPA Should Have Prepared an EIS on the Council's Plan Prior to Its Adoption .....	14
3. The Ninth Circuit's Holding That Neither BPA nor the Council Has Taken a Sub- stantial Federal Action Affecting the Human Environment Conflicts Dramat- ically with Other Circuits .....	15
B. The Council Should Have Drafted a State EIS on the Plan. The Ninth Circuit's Con- trary Ruling Improperly Encroaches on a State's Authority to Impose Its Own Environ- mental Review Standards .....	16
CONCLUSION .....	19

## TABLE OF AUTHORITIES CITED

	Page
CASES	
Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971) .....	14
Environmental Defense Fund v. Environmental Protection Agency, 489 F.2d 1247 (D.C. Cir. 1973) .....	13
Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma, 426 U.S. 776 (1976) .....	13
Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963) .....	18
Garcia v. San Antonio Metro Transit Authority, — U.S. —, 105 S. Ct. 1005 (1985) .....	16, 17
Hart v. Denver Urban Renewal Authority, 551 F.2d 1178 (10th Cir. 1977) .....	16
Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981) .....	18
Pennsylvania v. Nelson, 350 U.S. 497 (1956) .....	18
People v. City of South Lake Tahoe, 466 F. Supp. 527 (E.D. Cal. 1978) .....	17, 18
Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973) .....	13
Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973) .....	15, 16
Rice v. Santa Fe Elevator Corporation, 331 U.S. 218 (1947) .....	19
Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission, 481 F.2d 1079 (D.C. Cir. 1973) .....	14
Wilson v. Lynn, 372 F. Supp. 934 (D. Mass. 1974) .....	15

## TABLE OF AUTHORITIES CITED—Continued

	Page
STATUTES	
Energy Supply and Environmental Coordination Act, 15 U.S.C. § 793(c)(1) .....	12
Mont. Rev. Code Ann. § 75-1-201(1)(b) (1983) .....	18
National Environmental Policy Act, 42 U.S.C. § 4321, et seq. ....	4
§ 4332 .....	7, 13
§ 4332(2)(C) .....	8
Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839, et seq. ....	3, 8, 12, 13, 19
§ 839(3)(C) .....	19
§ 839a(14)(A) .....	5, 17
§ 839a(14)(B) .....	5, 17
§ 839b .....	7
§ 839b(a)(2)(A) .....	12
§ 839b(a)(3) .....	12
§ 839b(a)(4) .....	8
§ 839b(c)(10)(A) .....	9, 14
§ 839b(d)(1) .....	8, 9
§ 839b(2)(A) .....	9
Regional Rail Reorganization Act, 45 U.S.C. § 791(c) .....	12
Wash. Rev. Code Ann. § 43.31c.030(2) (1983) .....	18

## TABLE OF AUTHORITIES—Continued

Page

## UNITED STATES CONSTITUTION

Art. II, § 2, cl. 2 .....	9, 10
---------------------------	-------

## RULES

Supreme Court Rule No. 36 .....	1
---------------------------------	---

## MISCELLANEOUS

Breyse, "The Health Cost of 'Tight' Homes," Journal of the American Medical Association, Vol. 245 at 267 (Jan. 16, 1981) .....	6
Bronson, "Some Like It Comfortable," Forbes, June 30, 1986 .....	6
Carey, Hager & Zuckerman, "Beware 'Sick- Building Syndrome' " Newsweek, Jan. 7, 1985 .....	6
H. 9866, 126 Cong. Rec. (daily ed. Sept. 29, 1980) .....	12
House Committee on Interior and Insular Affairs, Rep. No. 976 (Part II), 96th Cong., 2d Sess. 70 (1980), reprinted in part in 1980 U.S. Code Cong. & Ad. News 6063 .....	11
House Committee on Interstate and Foreign Commerce, Rep. No. 976 (Part I), 96th Cong., 2d Sess. 28, reprinted in part in 1980 U.S. Code Cong. & Ad. News 5994 .....	10
H.R. 3074, 99th Cong. 1st Sess. (1985) .....	19
Murphy, "The Colorless, Odorless Killer," Time, July 22, 1985 .....	6
115 Cong. Rec. 39,703 (1969) .....	13



No. 86-629

---

In The  
**Supreme Court of the United States**  
October Term, 1986

---

SEATTLE MASTER BUILDERS  
ASSOCIATION, *et al.*,  
*Petitioners,*  
v.

PACIFIC NORTHWEST ELECTRIC POWER  
AND CONSERVATION PLANNING COUNCIL,  
*Respondent.*

UNITED STATES OF AMERICA,  
*Intervenor-Respondent.*

---

On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

---

**BRIEF AMICUS CURIAE OF  
PACIFIC LEGAL FOUNDATION IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

---

**INTEREST OF AMICUS**

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Seattle Master Builders' petition for writ of certiorari. Consent for filing this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt public interest organization with over 19,000 contributors and supporters located throughout the country.

PLF's principal office is located in Sacramento, California, and PLF has liaison offices in Seattle, Washington, and Anchorage, Alaska.

Since its establishment in 1973, PLF has actively engaged in research and litigation over a broad spectrum of public interest issues. PLF advocates a balanced approach in dealing with public interest issues, and supports the concept that governmental decisions and policies should reflect a careful assessment of not only the benefits, but also the social and economic costs involved. PLF has stressed this approach in the area of land use and environmental regulation.

In addition, PLF believes that governmental decisions must be made pursuant to law and that the authority to make such decisions must not be exercised in contravention of constitutional and statutory proscriptions. It has therefore been the policy and practice of PLF to protect individual liberties and personal property rights against excessive or illegal government conduct.

All citizens of the Pacific Northwest, a number of whom are PLF contributors and supporters, will be significantly impacted by the decisions of the Northwest Electric Power and Conservation Planning Council (Council). These decisions will result in far-reaching economic and social impacts and will also significantly affect the quality of the environment. The power to so substantially impact the lives of many must be exercised in accordance with the law.

PLF submits this *amicus curiae* brief in order to demonstrate that the Council is exercising its power

illegally by violating important principles of the environmental laws of this land.

---

O

---

**OPINION BELOW**

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 786 F.2d 1359 (1986) and appears in Appendix A to the petition for writ of certiorari.

---

O

---

**STATEMENT OF THE CASE**

Amicus curiae adopts petitioners' statement of the case found at Page Nos. 4 through 10 of the petition for writ of certiorari.

---

O

---

**SUMMARY OF ARGUMENT**

The Northwest Power Planning Council members are authorized pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (Act), Pub. L. No. 96-501, 94 Stat. 2697 (1980), 16 U.S.C. § 839, to draft a comprehensive Northwest Conservation and Electric Power Plan (Plan). The Plan is to be implemented by the Bonneville Power Administration (BPA) for the entire Pacific Northwest region. In drafting and enforcing the Plan, the Council has considerable control over the conduct of BPA because BPA is directed under the Act to pursue only those actions which are consistent with the Plan.

The Plan was promulgated by the Council and will direct BPA's energy conservation and development program over the next 20 years. This program includes numerous actions which will significantly affect the quality

of the human environment. Under these circumstances, both state and federal environmental disclosure statutes require preparation of an environmental impact statement (EIS) to ensure that a full disclosure of environmental information is available for proper consideration during decision making. Nevertheless, no EIS was prepared and the Ninth Circuit sanctioned the omission by ruling that neither state nor federal law required preparation of an EIS. In so ruling, the court misinterpreted state and federal statutes and placed the Ninth Circuit 180° out of step with other federal circuits.

## I

### **THE NINTH CIRCUIT HAS CREATED A GIANT LOOPHOLE IN ENVIRONMENTAL PROTECTION WHICH WILL LEAD TO AVOIDANCE OF ENVIRONMENTAL LAWS**

In response to the Council's claim that it need not comply with either the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, or state environmental protection statutes in preparing the Northwest Conservation and Electric Power Plan, the Ninth Circuit created a giant loophole in the laws of environmental protection. The court so ruled despite the uncontroverted facts that the Council's actions may significantly affect the environment. Among those facts are:

1. The Council's Plan constitutes the primary "strategy" for meeting all of the "electrical energy needs" of the entire Pacific Northwest Region<sup>1</sup> for the next 20 years. Plan Vol. I at iii.

---

<sup>1</sup> The Pacific Northwest region is the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, (continued)

2. The Plan calls for a demand of between 17,834 and 26,245 megawatts of electricity by the year 2002 which will require a combination of conservation to reduce the need for electricity and new electrical generation resources.<sup>2</sup>

3. Among the specific actions identified to be taken are: (a) directing BPA to acquire between 1,000 and 11,000 megawatts of electric energy resources throughout the region, Plan Vol. I, Figure Nos. 5-1 to 5-4; and (b) imposition of a mandatory conservation program as part of the Council's two-year action plan which includes measures in the residential sector to weatherize existing houses and set weatherization standards for both new houses and houses converting to electric space heating, as well as measures in the commercial building, government, industrial, and agricultural sectors, plus existing power system efficiency improvements. Plan Vol. I, Figure No. 10-1. Weatherization standards for residential buildings alone could create significant health problems due to an increase in indoor air pollutants such as carbon monoxide, particulates, formaldehyde, and radon gas which has been shown to be carcinogenic.

“[T]he present energy conservation program as it applies to building structures and, most important, homes involves making our habitable structures as

---

and such portions of the States of Nevada, Utah, and Wyoming that are within the Columbia River drainage basin. 16 U.S.C. § 839a(14)(A). Parts of California are also served by BPA. 16 U.S.C. § 839a(14)(B).

<sup>2</sup> Hydropower, geothermal, wind, solar, biomass, cogeneration, nonbiomass, coal, and nuclear. Plan Vol. I at Page Nos. 8-1 through 8-6.

'tight' as possible. There is no doubt that unless a reasonable and logical plan is developed, the deleterious health impacts of excessive home tightening will be enormous." Breysse, "The Health Cost of 'Tight' Homes," *Journal of the American Medical Association*, Vol. 245 at 267 (Jan. 16, 1981).

"What environmental scientists call 'sick buildings' pose a problem that cuts across, social and economic boundaries. They have been found everywhere from trailer parks in Texas to an Environmental Protection Agency office in Washington. 'We're just beginning to identify the problem of indoor air pollution,' says Hugh Kaufman, EPA hazardous waste expert and whistle-blower. 'But everywhere we look it is worse than we expected.'" Carey, Hager & Zuckerman, "Beware 'Sick-Building Syndrome,'" *Newsweek*, Jan. 7, 1985, at 58.<sup>3</sup> See also Murphy, "The Colorless, Odorless Killer," *Time*, July 22, 1985, at 72. Cf. Bronson, "Some Like It Comfortable," *Forbes*, June 30, 1986, at 116.

---

<sup>3</sup> "The key question, of course, is how serious a threat these indoor pollutants are to health. The clearest danger is posed by radon gas. Produced by the decay of uranium 238, a ubiquitous trace element in the earth's crust, inert radon does not bind to minerals and thus accumulates in the tiny air pockets in soil. From there, it is pulled into houses by pressure differences created by the rising of warm indoor air. Once inside, radon decays into other radioactive elements, such as polonium, that bind to dust and are inhaled into the lungs, where they can cause cancer.

"Extrapolating from rates of lung cancer in uranium miners, who are exposed to known amounts of radon and its products, researchers have calculated that 2,000 to 20,000 cases of the disease each year may be caused solely by indoor radon pollution. The geology of Maine and parts of Pennsylvania, Maryland, Oregon and Montana leads to particularly high radon risks. 'There are about a million homes with radon levels over the recommended standard,' says Anthony Nero of [Lawrence Berkeley Laboratories]. 'No other environmental risk, such as toxic-waste dumps, affects that many homes.'" Carey, Hager & Zuckerman at 59-60.

As the nationwide scope of the above quotations suggests, the danger is not limited to the people of the Pacific Northwest. The danger is increased by the potential for the Council's conservation standards to become models for building codes elsewhere in the United States, without an adequate analysis of the environmental impacts.<sup>4</sup>

Despite these significant environmental impacts the Ninth Circuit reached the curious conclusion that no environmental planning statutes applied to the Council or its Plan. The court found that the member states of the Council had not reserved rights to apply state environmental laws to the Council, and neither BPA nor the Council had taken a substantial federal action affecting the human environment which might trigger application of federal environmental laws. 786 F.2d at 1371. The impact of this ruling is to create a giant loophole in the environmental planning process. This was never intended by Congress. A clear, unencumbered reading of the Act "construed in a consistent manner" (16 U.S.C. § 839b), with Congress' unequivocal direction that the EIS process should be complied with "to the fullest extent possible" (42 U.S.C. § 4332) demonstrates that *both* federal

---

<sup>4</sup> Also of concern to PLF is the potential liability of home builders when people using homes built to comply with the Council's standards become ill or die. To the knowledge of PLF, no appellate court has yet addressed the issue of builders' liability for injuries or illness caused by installing measures required by law. If a negligence standard were applied, and liability were based on fault, home builders would not be liable. But if a strict liability standard were applied, and liability were based on home buyers' reasonable expectations of safety, the nation's home builders could face billions of dollars of liability. At present, there is no way to tell which way the courts will go.



and state environmental laws apply to the actions of the Council.

**A. NEPA Mandates That an EIS Be Prepared  
Assessing the Northwest Power Plan**

NEPA states that "all agencies of the Federal Government shall— . . . (C) include in . . . major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), an environmental impact statement. Adopting the Northwest Power Plan which directs the energy production strategy over the next 20 years for the Pacific Northwest is undoubtedly a major federal action significantly affecting the quality of the human environment. *See, supra*, at 4-6. There is no question that an EIS should have been prepared. The only question is whether the Council, if it is a federal agency under NEPA, or, if not, BPA which funded the Plan, was responsible to do it.

**1. The Northwest Power Planning Council  
Is a Federal Agency for the Purposes  
of NEPA and Should Have Filed an  
Environmental Impact Statement**

The Council possesses *all* the indicia of a *federal* agency.

1. The Council and all its responsibilities are the product of *federal* legislation, 16 U.S.C. § 839, *et seq.*

2. The Plan was developed pursuant to 16 U.S.C. § 839b(d)(1) for the purpose of directing the BPA, a *federal* agency, in its energy acquisition.

3. The Act requires the Council to follow the *federal* laws applicable to the BPA in matters relating to contract formation, financial disclosure, advisory committees, and disclosure of information, 16 U.S.C. § 839b(a)(4).

4. Funding for the Council's electric energy Plan and its fish and wildlife program is provided by BPA, a *federal agency*, 16 U.S.C. § 839b(c)(10)(A).

5. Public hearings on establishment of the Plan are subject to Section 553 of the *federal* Administrative Procedure Act at a minimum, 16 U.S.C. § 839b(d)(1).

6. Even salaries of employees are limited by reference to the rate prescribed for *federal* officers at Step No. 1 of Level GS-18 of the general schedule.

In every respect, the Council acts like a federal agency.

The Council has argued, though, that 16 U.S.C. § 839b(2)(A) exempts it from complying with NEPA requirements imposed on federal agencies. The language is not without exception, however. It reads that the Council, "*except as otherwise provided in this chapter*, shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law." (Emphasis added.) This exception to the Council's general exemption from having to comply with federal laws negates the Council's argument. The history behind this provision explains why. The purpose of the general exemption was not to eliminate federal environmental statutory requirements but to avoid a violation of the Appointments Clause of the United States Constitution, which requires federal officers to be appointed not by Congress or state governors but generally by the President.<sup>5</sup> U.S. Const. Art. II, § 2, cl. 2.

---

<sup>5</sup> Appointment of Council members by state governors violates the Appointments Clause. U.S. Const. Art. II, § 2, cl. 2. As Judge Beezer found in his dissent, by issuing the Plan, members of the Council exercise significant federal authority (continued)

On August 3, 1979, the Senate passed Senate Bill 885 (precursor of the Act) calling for five Council members, four appointed by governors. The fifth was the BPA administrator. By letter of October 25, 1979, the Justice Department issued an opinion letter that this appointment process for members was unconstitutional. *See* Addendum A to Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioners Seattle Master Builders Association, *et al.* (PLF's Ninth Circuit Amicus Brief).

On March 19, 1980, one of the two House Committees to which S. 885 was referred recommended an amended version that called for 11 Council members. All were to be appointed by the Secretary of Energy upon the recommendation of the region's governors. House Committee on Interstate and Foreign Commerce, Rep. No. 976 (Part I), 96th Cong., 2d Sess. 28, *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 5994 (House Commerce Report). This version of the bill did not raise any Appointments Clause problems because, unlike the Senate version of S. 885, Congress was conscious of the issue. Accordingly, Congress eliminated gubernatorial appointments and included language stating that the Council members were not to be deemed officers of the United States. House

---

pursuant to the laws of the United States. *See* Beezer dissent, 786 F.2d at 1375-76, for itemization of substantive actions Council takes under the Act which in part control the actions of the federal Bonneville Power Administration. "In sum, the Planning Act gives the Council the ability to produce significant substantive effects" on a federal agency and "[b]ecause the President did not appoint the members of the Council, the Council's actions are contrary to the Constitution and therefore void." *Id.* at 1376. *See* U.S. Const. Art. II, § 2, cl. 2 (Appointments Clause).

Commerce Report at 4. Simultaneously, language was included for the first time that the purposes of the Act were consistent with applicable provisions of environmental laws. *Id.* at 2.

As of September 16, 1980, the other House committee to be referred S. 885 recommended another version. It called for eight Council members with two each from Washington, Oregon, Idaho, and Montana to be directly appointed by their respective state governors. The purpose of the change, according to Representative Pat Williams, was to ensure regional control over regional power matters, and to provide a more meaningful check (*i.e.*, control) on the BPA administrator. House Committee on Interior and Insular Affairs, Rep. No. 976 (Part II), 96th Cong., 2d Sess. 70 (1980), *reprinted in part in* 1980 U.S. Code Cong. & Ad. News 6063 (House Interior Report). But giving state governors appointment authority of Council members created the inherent danger of violating the Appointments Clause, so Congress included a new provision in the Act. Besides reiterating that Council members were not officers of the United States and that the Act was to be consistent with environmental laws, the new version of S. 885 stated that if the Council were declared by the court to violate the Appointments Clause, the Council would be reconstituted as a federal agency with members once again appointed by the Secretary of Energy upon nomination of the governors. House Commerce Report at 41, 70-71.

By September 29, 1980, the two committee versions of S. 885 had been reconciled and the Commerce Committee version with minor changes eventually passed into law. Again, Council members and employees were not to be considered officers of the United States but, for the first

time, the critical exemption language earlier quoted and relied upon by the Council for a NEPA exemption was included with the modifying phrase "except as otherwise provided in this Act," H. 9866, 126 Cong. Rec. (daily ed., Sept. 29, 1980). Congress then specifically provided in the Act the *exception*—the "purposes [of the Act which included providing environmental quality] are . . . intended to be construed in a manner consistent with applicable environmental laws." *Id.* at H. 9865. Thus, Congress clearly sought to protect the environment yet avoid a violation of the Appointments Clause.

This course of legislative history undeniably shows that the exclusionary language of 16 U.S.C. § 839b(a)(2) (A) and (a)(3) was included only to try to protect the Council from an Appointments Clause challenge and, in fact, only after Congress became concerned about this problem, did it expressly include the critical operative language that the purposes of the Act are "intended to be construed in a manner consistent with applicable environmental laws," 16 U.S.C. § 839. Congress simply had no intention of exempting the Council from environmental considerations or NEPA.<sup>6</sup> No other conclusion is reasonable, for to find otherwise creates the anomaly that Congress sought to protect environmental quality by

---

<sup>6</sup> If Congress had wanted to exempt the Council from NEPA it would have done so expressly. For example, Congress exempted any action taken under the Clean Air Act stating that "[n]o action . . . shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969." 15 U.S.C. § 793(c)(1). Likewise in the Regional Rail Reorganization Act, Congress stated: "The provisions of section 4332(2)(C) of Title 42 [EIS requirements] shall not apply with respect to any action taken under authority of this chapter . . . ." 45 U.S.C. § 791(c).

exempting the Council from those laws which require environmental scrutiny in decision making. Such a conclusion would be preposterous.

Under these circumstances where there is no clear congressional intent to exempt the Council, it must comply with the environmental impact statement requirement "to the fullest extent possible." 42 U.S.C. § 4332. As Congress stated:

" '[E]ach agency of the Federal Government *shall* comply with the directives set out in [§ 102(2)] *unless* the existing law applicable to such agency's operations *expressly* prohibits or makes full compliance with one of the directives impossible . . . .' " *Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776, 787-88 (1976) (emphasis in original); 115 Cong. Rec. 39703 (1969) (House Conferences).

Unmistakably, the Act neither expressly prohibits nor makes compliance with EIS requirements impossible. To the contrary, the Act requires that it be "construed in a manner consistent with applicable environmental laws." 16 U.S.C. § 839. The Council must be considered a federal agency *under NEPA* and should have filed an EIS.<sup>7</sup>

---

<sup>7</sup> In respondents' brief before the Ninth Circuit, the Council argued that its Plan, especially Chapter 9, is functionally equivalent to an environmental impact statement. The argument is baseless. The only agency allowed such an exemption has been the Environmental Protection Agency because it is designed specifically to protect the environment. See *Portland Cement Association v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973). Only agencies "engaged primarily in the examination of environmental questions" qualify for an exemption. *Environmental Defense Fund v. Environmental Protection Agency*, 489 F.2d 1247, 1257 (D.C. Cir. 1973). The Council is not an agency designed to protect the environment but is engaged primarily in planning for future energy needs. 16 U.S.C. § 839, et seq.



**2. If the Council Is Not a Federal Agency  
for NEPA Purposes, BPA Is, and BPA Should  
Have Prepared an EIS on the Council's  
Plan Prior to Its Adoption**

BPA is required to fund the Council's preparation of and then implement the Northwest Power Plan. 16 U.S.C. § 839b(c)(10)(A). Assuming, *arguendo*, that the Council is not a federal agency for NEPA purposes, BPA's funding action sufficiently "federalizes" the Plan so that BPA was required to prepare an EIS prior to the Plan's adoption by the Council.

Federal funding of state or local programs has been found on numerous occasions to provide the federal nexus necessary to require the preparation of an EIS. The rationale was explained in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1088 (D.C. Cir. 1973):

"[T]here is 'Federal action' within the meaning of the statute not only when an agency proposes to build a facility itself, but also whenever an agency makes a decision which permits action by other parties which will affect the quality of the environment. NEPA's impact statement procedure has been held to apply where a federal agency approves a lease of land to private parties, grants licenses and permits to private parties, or approves and funds state highway projects. In each of these instances, the federal agency took action affecting the environment in the sense that the agency made a decision which permitted some other party—private or governmental—to take action affecting the environment." (Footnotes omitted.)

*See Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971) (a federal law enforcement block grant used for the construction of a state medical and reception center for state prisoners,



sufficiently federalized the project to require an EIS); see also *Wilson v. Lynn*, 372 F. Supp. 934 (D. Mass. 1974); and *Proetta v. Dent*, 484 F.2d 1146 (2d Cir. 1973) (privately developed housing was federalized for NEPA purposes by the receipt of financial assistance through federal housing subsidies). Consequently, even if the Council is not characterized as a federal agency, BPA's funding has federalized the Plan requiring an EIS prior to its implementation. BPA did not and has not prepared an EIS analyzing the environmental effects of the Plan, or all reasonable alternatives for providing the Pacific Northwest with the energy that will be needed over the next 20 years. This failure clearly violates NEPA.

**3. The Ninth Circuit's Holding That Neither BPA nor the Council Has Taken a Substantial Federal Action Affecting the Human Environment Conflicts Dramatically with Other Circuits**

In effect the Ninth Circuit ruled that the *Plan* does not constitute an action significant enough in its impacts on the human environment to require an EIS. 786 F.2d at 1371. It is hard to believe that a Plan which directs for the next 20 years how the Pacific Northwest region of the United States will meet its projected electric energy demand does not constitute an action which may significantly affect the human environment. The Plan calls for BPA to acquire 1,000 to 11,000 megawatts of electric energy resources. It calls for the development of conservation measures such as intensive weatherization, as an energy source with a projected acquisition figure of between 660 and 4,790 megawatts over a 20-year period. This finding of the Ninth Circuit is problematic in that other circuits require preparation of an EIS for actions

invoking impacts far less serious than the Plan's. *E.g.*, *Proetta v. Dent*, 484 F.2d at 1146 (federal approval of loan to finance portion of expansion of paper machinery company); *Hart v. Denver Urban Renewal Authority*, 551 F.2d 1178 (10th Cir. 1977) (loan and capital grant made by the federal Department of Housing and Urban Development to city urban renewal authority).

The Ninth Circuit has found that the 20-year regional power plan for the Pacific Northwest with its inherently significant energy conservation and resource development requirements does not constitute substantial enough action to call for an EIS. This finding puts this circuit out of step with every other circuit in the United States. For this reason alone the Supreme Court should grant the petition for writ of certiorari.

**B. The Council Should Have Drafted a State EIS on the Plan. The Ninth Circuit's Contrary Ruling Improperly Encroaches on a State's Authority to Impose Its Own Environmental Review Standards**

The Ninth Circuit's facile ruling has encroached upon the authority of Washington and Montana to adopt and enforce laws which are the proper subject matter of state legislation. The court has approved a model act, a model regional planning agency, and a model regional plan, all of which creates a model structure to avoid compliance with state and local decision-making procedures, and environmental laws. The effect of this approval is to invalidly sanction a governmental structure which unconstitutionally denies states the freedom to engage in legitimate state governmental activities. *See Garcia v.*

*San Antonio Metro Transit Authority*, — U.S. —, 105 S. Ct. 1005 (1985).

The court found that the Council, as a compact,<sup>8</sup> need not comply with state EIS requirements. 786 F.2d at 1371. To reach this conclusion the court relied upon a completely incorrect analysis of *People v. City of South Lake Tahoe*, 466 F. Supp. 527 (E.D. Cal. 1978). It found that the states must “specifically reserve[] the right to impose regulations which [are] more stringent than those imposed by the compact organization itself,” and that “[n]either Washington nor Montana reserved such rights

---

<sup>8</sup> Though for purposes of the applicability of environmental planning statutes it is nondeterminative, it is worth noting that the Council is not an interstate compact agency. As Judge Beezer noted the Council lacks several classic indicia of an interstate compact agency:

1. “All four states [represented on the Council] are free to repeal their statutes unilaterally.” 786 F.2d at 1372.

2. “[T]he creation of the Council [is authorized] on the consent of only three of the four states,” allowing the Council to take action “that could have substantive effects in a non-member state. If the Council [were] truly an interstate compact agency, that result would not be possible.” *Id.* (footnote omitted). (In fact, the Council’s actions do affect nonmember states already—Nevada, Utah, Wyoming, and California. 16 U.S.C. § 839(a)(14)(A) and (B)).

3. The four member states establish “policy and standards, not for each other, but for a federal agency with regional authority extending beyond those states.” 786 F.2d at 1372.

4. The Council lacks a state purpose—the purpose of the Council is simply to guide the actions of the BPA, a federal agency. *Id.* at 1373. Such characteristics plainly demonstrate that the Council is not an interstate compact agency.

in their statutes agreeing to establishment of the Council." 786 F.2d at 1371.<sup>9</sup> Not only was the Court's application of the *City of South Lake Tahoe* principle analytically wrong,<sup>10</sup> it totally missed the issue. That issue is whether or not state environmental laws were preempted by the Act. There is no question that Congress has the authority under the Commerce Clause of the Federal Constitution to legislate in the field of energy production. *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981). But before such federal legislation can be found to preempt state law it must be found that either:

1. Congress clearly expressed its intent to preempt the state, *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 147-50 (1963);

2. the federal statutory and regulatory scheme is so pervasive that no room is left for state regulation, *Pennsylvania v. Nelson*, 350 U.S. 497, 502-04 (1956); or

---

<sup>9</sup> The court did not question that the Council could have been required under state law to file an EIS for its energy plan. As amicus demonstrated in its brief before the Ninth Circuit, under Washington and Montana law the Council is a "state agency" and the Plan is a "major action affecting the quality of the environment" thus requiring an EIS under Washington and Montana law. Wash. Rev. Code Ann. § 43.31c.030(2) (1983); Mont. Rev. Code Ann. § 75-1-201(1)(b) (1983). See PLF's Ninth Circuit Amicus Brief at 36-40.

<sup>10</sup> In *City of South Lake Tahoe* the court did not find an express reservation but an implied reservation by California of the right to require the Tahoe Regional Planning Agency, an interstate compact agency, to follow the California Environmental Quality Act. The Northwest Power Act embodies an analogous implied reservation by Washington and Montana to require the Council to follow their environmental laws. This is irrelevant, however, since the court's focus should have centered on whether or not these state environmental laws were preempted by the Act.

3. adherence to the state law may produce a result inconsistent with the stated purpose of the federal statute. *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230 (1947). None of these criteria are met by the Act. The Act actually directs that its purposes are to be construed in a manner consistent with applicable environmental laws (16 U.S.C. § 839) and among those purposes is "providing environmental quality" (16 U.S.C. § 839(3)(C)). Thus, the lower court's imputed conclusion that state environmental laws are preempted by the Act constitutes judicial overreaching at its worst, and merits review by this Court.

---

### CONCLUSION

The Ninth Circuit's decision finding the Council subject to neither federal nor state environmental disclosure statutes has created a frightening abyss in the field of environmental protection. The lower court has established the proposition, in conflict with other circuits, that significant actions affecting the environment need not follow the environmental protection planning process required by state and federal law if the actions are taken by an interstate compact agency. Already, bills have been introduced in Congress modeled after the Council which will further expand this planning loophole. See H.R. 3074, 99th Cong., 1st Sess. (1985) (proposed Regional Conservation and Electric Power Planning and Regulatory

Coordination Act of 1985). The Ninth Circuit's decision, allowed to stand, will turn this loophole into a schism of monumental proportions. A writ of certiorari should issue.

DATED: December, 1986.

Respectfully submitted,

RONALD A. ZUMBRUN

\*ROBIN L. RIVETT

\*COUNSEL OF RECORD

Pacific Legal Foundation

555 Capitol Mall, Suite 350

Sacramento, California 95814

Telephone: (916) 444-0154

*Attorneys for Amicus Curiae,  
Pacific Legal Foundation*

